RECORD, CASE Nos. 13,816 and 13,817.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 215.

ELIZABETH B. McCOMB, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF HENRY S. McCOMB, DECEASED, APPELLANT,

vs.

GEORGE A. FRINK AND ESTHER S. SNYDER, ADMINISTRATOR AND ADMINISTRATRIX OF C. BROWN SNYDER, DECEASED.

TERM No., 216.

GEORGE A. FRINK AND ESTHER S. SNYDER, ADMINISTRATOR AND ADMINISTRATRIX OF C. BROWN SNYDER, DECEASED, APPELLANTS,

vs.

ELIZABETH B. McCOMB, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF HENRY S. McCOMB, DECEASED.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

FILED OCTOBER 18, 1889.

estates of decedents, which may be summarized as follows:

FIRST. A creditor who has the necessary citizenship may obtain judgment against the administrator in the Federal Courts.

SECOND. Such creditor may not press his judgment to execution in such manner as to receive a preference over home creditors.

THIRD. Such creditor, or any person interested in the estate, having the necessary citizenship, may by bill filed require an administrator or executor to appear in the Federal Courts, and state an account as trustee in equity, and that Court will marshall the assets and distribute to creditors, legatees or next of kin, according to the laws of the domicil; and in fact the Courts of the United States have so proceeded at all stages of the settlement of the estate of the decedent, both before and after decree of the local probate Court.

In conclusion we would urge that the argument of appellants' counsel claims too much. There is nothing in the mere fact of advertisement upon the audit list of the Orphans' Court which placed the estate any more in the control of the Court than it had been before that time. If the assets of the decedent were in *gremio legis*, in the actual custody of the Court, they were so at the time the letters of administration were granted. There is no dividing line after that time. If then upon grant of letters of administration the jurisdiction of the Orphans' Court attaches and can not afterwards be ousted, the Federal Courts are absolutely shorn of their jurisdiction upon this class of cases, a result which would unsettle every adjudged case of this Court upon the subject.

THOS. PATTERSON,

Counsel for the "Pittsburgh and Allegheny Home for the Friendless," Appellee.

149 US 629

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1892.

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1 Circuit Court of the United States for the District of Delaware.

UNITED STATES OF AMERICA, *District of Delaware,* } *ss:*

At a stated term of the circuit court of the United States of America for the district of Delaware begun and held according to law at the city of Wilmington, in said district of Delaware, on the third Tuesday (being the eighteenth day) of June, A. D. 1889—present, the Honorable Joseph P. Bradley, circuit justice, presiding; the Honorable Leaonard E. Wales, district judge; Charles M. Newlin, marshal; S. Rodmond Smith, clerk—among other the following proceedings were had, to wit:

2 GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of the Goods, Chattels, and Credits of C. Brown Snyder, Late of the City of New York, in the State of New York, Deceased,

vs.

ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, Late of the City of Wilmington, in the State of Delaware, Deceased.

No. 96. In Equity.

Be it remembered that heretofore, to wit, on the thirtieth day of January, A. D. 1883, came the said complainants, by their solicitor, George Gray, and filed their bill of complaint and præcipe for subpœna to defendant as follows:

3 To the honorable the judges of the circuit court of the United States in and for the district of Delaware, in the third circuit:

George A. Frink, of the city of New York, in the county of New York and State of New York, a citizen of the State of New York, and Esther S. Snyder, of the city of New York, in the county of New York and State of New York, a citizen of the State of New York, as administrator and administratrix of the goods, chattels, and credits of C. Brown Snyder, late of said city of New York, now deceased, bring this their bill of complaint against Elizabeth B. McComb, sole executrix of the last will and testament of Henry S. McComb, late of the city of Wilmington, in the State of Delaware, now deceased.

And thereupon your orators complain and say:

First. That prior to the 23d day of November, in the year eighteen hundred and sixty-nine, said Henry S. McComb held in his own name, in trust for one Josiah Bardwell, an original subscription of sixty thousand dollars in the Southern Railroad Association; that said Southern Railroad Association was at first a voluntary associa-

tion of individuals associated together under written articles
4 of association made on or about the thirtieth day of June, in the year eighteen hundred and sixty-eight, having a capital of fifteen hundred thousand dollars, all of which had been duly subscribed; that by virtue of such subscription said Henry S. McComb, as such trustee, became and was entitled to a one twenty-fifth interest in all the property and affairs of said association and in all the profits to be derived from the business thereof; that afterwards, but before the said 23d day of November, in the year eighteen hundred and sixty-nine, said association had, pursuant to the terms of said articles of association, increased its capital by the amount of five hundred thousand dollars as a dividend among the members of said association of the earnings and profits thereof, one twenty-fifth part of which increase was subscribed for and taken by the said Henry S. McComb as such trustee, which subscriptions so taken by said McComb and the interest in said association and its property and affairs and in the profits of its business acquired thereby were held by said Henry S. McComb in trust for the said Josiah Bardwell as aforesaid; that said association was engaged in the business of leasing and operating lines of railroad in different States
5 of the United States, ecpecially in that part of the United States known as the Southern States.

Second. And your orators further show that on and prior to said twenty-third day of November, in the year eighteen hundred and sixty-nine, there had been paid by the said Bardwell on account of said original subscription seventy per cent. thereof, and that thereafter, as your orators have been informed and verily believe, there were paid by said C. Brown Snyder all sums that were required to be paid by said association upon or by reason of such subscription.

Third. And your orators further show that about two months prior to said twenty-third day of November said Josiah Bardwell, for and in consideration of full value paid to him therefor by said C. Brown Snyder, of which payment said McComb had notice, sold and transferred to said Snyder all his interest in said subscription so held in trust for him by said Henry S. McComb, and thereupon required said McComb to acknowledge that he held such subscription in trust for said C. Brown Snyder.

Fourth. And your orators further show that thereupon and
6 on or about the twenty-third day of November, in the year eighteen hundred and sixty-nine, said Henry S. McComb executed and delivered to said C. Brown Snyder a declaration of such trust as follows:

"To whom it may concern:

"I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an agreement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. had been paid.

"This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself.

"(Signed) H. S. McCOMB, *Trustee.*"

And that thereafter said Henry S. McComb held the said subscription and all accretions thereto and all the interest in the property, affairs, and profits of said Southern Railroad Association acquired or represented thereby or in any manner belonging or accruing to the owner or holder of the same in trust for the said C. Brown Snyder and not otherwise.

Fifth. And your orators further show upon information and belief that the said Southern Railroad Association was duly
7 incorporated by acts of the legislature of the State of Tennessee and Mississippi in or about the year eighteen hundred and seventy, and the said Henry S. McComb became the president of the said corporation so incorporated; that thereupon the said interest so owned and held by said Henry S. McComb in trust originally for said Bardwell and afterwards for said Snyder became and was represented by a corresponding and proportionate share and interest in the said corporation and the capital stock thereof, and that the said Henry S. McComb, as trustee as aforesaid for the said C. Brown Snyder, became and was entitled to such proportionate share and interest in the said corporation and the capital stock thereof and of all the benefit and advantage accruing therefrom and thereupon as such trustee acquired and exercised the control and management of the same.

Sixth. And your orators further show upon information and belief that the said Southern Railroad Association and the said corporation transacted a large business and made and realized large profits and benefits and advantages, and the equitable share and interest of the said C. Brown Snyder in the said subscription and in the capital stock of the said corporation which were, as aforesaid, held in trust for him by the said Henry S. McComb became very
8 valuable, and the said Henry S. McComb received and derived great profit, benefit, and advantage therefrom, and that the said Henry S. McComb furthermore received and derived great profit, benefit, and advantage from his own operations in and about and with the business and property of the said Southern Railroad Association both before and after its incorporation as aforesaid, in which profit, benefit, and advantage the said C. Brown Snyder became and was entitled to his own proper share and proportion by virtue and by reason of the aforesaid trust in his favor.

Seventh. And your orators further show upon information and belief that the said Henry S. McComb, after having received and derived great benefit and advantage and profit from the said subscription and the said proportionate share of the capital stock aforesaid, did, on or about the first day of December, in the year eighteen hundred and seventy-one, and without the consent or knowledge of the said C. Brown Snyder, and in violation of his duties as such trustee as aforesaid, and in violation of the rights of the said C. Brown Snyder in the premises, convert to his own use and appropriate and dispose of for his own personal and individual
9 benefit and gain the whole of the said stock then held by him under and upon the aforesaid trust, being eight hundred shares of the capital stock of the said Southern Railroad Associa-

tion, and that at the time of such conversion and appropriation the said capital stock was worth at least the sum of one hundred and twenty-five dollars per share; that the said conversion of such stock was concealed by the said Henry S. McComb and was never discovered by the said C. Brown Snyder in his lifetime, nor was the same discovered by your orators until within the period of six months now last past, and that the same remained concealed and undiscovered without any fault or laches on the part of the said C. Brown Snyder or on the part of your orators until within the period last aforesaid.

Eighth. And your orators further show that the said Henry S. McComb and the said defendant as his executrix have wholly failed and neglected to account to the said C. Brown Snyder or to your orators as his administrator and administratrix as aforesaid for the acts and doings of the said Henry S. McComb in and about his aforesaid trust and for monies and stock and profits and the various benefits and advantages received and acquired by him, the
10 said Henry S. McComb, in and about the same or with which as such trustee for the benefit of said C. Brown Snyder he was or at any time became justly chargeable, although often requested so to do, and that no part of the capital stock of the said corporation so held in trust by the said McComb and no part of the said profits, benefits, or advantages so as aforesaid derived or realized by the said Henry S. McComb therefrom or from said subscription or with which the said Henry S. McComb became properly chargeable as such trustee have ever been transferred or paid over to the said C. Brown Snyder or to your orators as the administrator and administratrix of the goods, chattels, and credits which were of the said C. Brown Snyder as aforesaid, and that, without an accounting in respect thereof, your orators are unable to state what amount of money was held by the said Henry S. McComb as such trustee or was justly chargeable in favor or for the benefit of the said C. Brown Snyder and against the said Henry S. McComb as such trustee at the time of his death, but your orators allege, upon information and belief, that the amount of such money to which they are entitled is very large.

11 Ninth. And your orators further show that said C. Brown Snyder died at the said city of New York on the eighteenth day of July, in the year eighteen hundred and eighty-two, intestate, and that your orators were, on the twenty-fifth day of November, in said year, duly appointed by the surrogate of the county of New York administrator and administratrix of the goods, chattels, and credits which were of said C. Brown Snyder; that they have duly qualified as such and taken upon themselves the administration thereof.

Tenth. And your orator- further show upon information and belief that said Henry S. McComb died on or about the thirtieth day of December, in the year eighteen hundred and eighty-one, having first made, published, and declared his last will and testament in due form of law, wherein and whereby he nominated and appointed the defendant, Elizabeth B. McComb, to be the executrix thereof; that said last will and testament has been duly proved before and ad-

mitted to probate by the register of wills at Wilmington, in and for the county of New Castle and State of Delaware, and letters testamentary were duly issued thereon by said register to
12 the defendant, Elizabeth B. McComb, who has duly qualified as such executrix and taken upon herself the burden of the execution of said will.

In consideration whereof, and forasmuch as your orators can only have adequate relief in this honorable court, where matters of this nature are properly cognizable and relievable—

To the end, therefore, that the said defendant, Elizabeth B. McComb, executrix as aforesaid, may, if she can, show why your orators as such administrators should not have the relief hereby prayed, and may without oath and according to the best and utmost of her knowledge, remembrance, information, and belief full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore set forth and alleged as fully and at large as though they were here again repeated and she were specially interrogated in relation thereto; that the said Henry S. McComb may be declared and determined to have held the aforesaid subscription and the aforesaid eight hundred shares of said capital stock in trust for the use and benefit of the said C. Brown Snyder; that said defendant, as such executrix, may be decreed to account to your orators as such administrators of and concerning the said original
13 subscription for sixty thousand dollars in the Southern Railroad Association so as aforesaid held by the said Henry S. McComb in his lifetime in trust for the said C. Brown Snyder and of and concerning the share and interest in said association both before and after its incorporation acquired by him by reason thereof or in any manner held by him in trust for the said C. Brown Snyder and of and concerning all accretions thereto and all profits, moneys, or other property or benefit or advantage realized or received by the said Henry S. McComb upon or by reason thereof or with which he became justly chargeable by reason of his acts and doings in the premises; that your orators, as such administrators, may be decreed to be entitled to all benefit and advantage received by said Henry S. McComb from said original subscription and to everything received by said McComb or to which he became entitled by reason thereof and to the value which the said stock bore or possessed at the time of the aforesaid conversion of the same by the said Henry S. McComb while the same was held by said McComb in trust for said Snyder as aforesaid, together with interest thereon; that said defendant, Elizabeth B. McComb, as such
14 executrix may be decreed to pay to your orators as such administrators such value of said subscription and the interest thereby acquired by said McComb in said association or corporation and in the property and affairs thereof, and also all profit, gain, increase, moneys, and property received or realized by said McComb or to which he became at any time entitled or with which he became properly chargeable for or by reason of his possession and legal ownership of such subscription and the interest in said association and corporation acquired thereby, with lawful interest, and that all

such accountings and other proceedings may be had herein as may be necessary or proper to the securing of full and adequate relief to your orators in the premises, and that your orators, as such administrators, may have such other and further relief in the premises as is agreeable to equity and good conscience—

May it please your honors to grant unto your orators as such administrators a writ or writs of subpœna of the United States of America issuing out of and under the seal of this honorable court, directed to the said Elizabeth B. McComb, as such executrix, commanding her, on a day certain therein to be named and
15 under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and to stand to, perform, and abide by such further order, direction, and decree as may be made against her.

And your orators, as such administrators, as in duty bound, will ever pray, &c.

ESTHER S. SNYDER.
GEO. A. FRINK.

T. F. BAYARD,
GEO. GRAY, *Sol's.*
MARSH, WILSON & WALLIS,
Sol's for Complainants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

George A. Frink, being duly sworn, deposeth and saith that he is one of the complainants in the foregoing bill named and has read the same and knows the contents thereof.

That what is contained in the said bill so far as concerns
16 complainants' act and deed is true of his own knowledge, and that what relates to the act and deeds of any other person he believes to be true.

GEO. A. FRINK.

Subscribed and sworn to before me this 16th day of January, 1883, at Newark City, in said district.

[Seal of U. S. Commissioner.]

JAMES H. GILBERT,
U. S. Commissioner, South. Dist. of N. Y.

Endorsed as follows: U. S. circuit court, district of Delaware. No. 96. In equity. George A. Frink and Esther S. Snyder, administrator and administratrix of C. Brown Snyder, dec'd, *vs.* Elizabeth B. McComb, executrix of the last will & testament of Henry S. McComb, deceased. Bill. File this bill & issue subpœna. Geo. Gray, sol. for compl't-. To S. Rodmond Smith, Esq., cl'k c. c. Filed January 30th, 1883. S. R. S.

And on the same day subpœna issued to the defendant as follows:

Subpœna.

UNITED STATES OF AMERICA, *District of Delaware,* } ss:

17 The President of the United States to Elizabeth B. McComb, sole executrix of the last will and testament of Henry S. McComb, late of the city of Wilmington, in the State of Delaware, now deceased, Greeting:

For certain causes offered before the honorable the judges of the circuit court of the United States for the district of Delaware we command and strictly enjoin you that, laying aside all manner of business and notwithstanding any excuse whatever, you personally be and appear before the said court, at Wilmington, in said district, on the first Monday in March next, then and there to make full, true, direct, and perfect answer to a certain bill of complaint exhibited against you by George A. Frink, of the city of New York, in the county of New York and State of New York, a citizen of the State of New York, and Esther S. Snyder, of the city of New York, in the county of New York and State of New York, a citizen of the State of New York, as administrator and administratrix of the goods, chattels, and credits of C. Brown Snyder, late of said city of New York, now deceased, and further to do and receive what the said court in that behalf shall consider to be done; and this in nowise omit under penalty of five hundred dollars.

18 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at [SEAL.] Wilmington, the 30th day of January, in the year of our Lord one thousand eight hundred and eighty-three, and of American Independence the one hundred and seventh.

S. RODMOND SMITH,
Clerk U. S. Circuit Court for the Delaware District.

Issued January 30th, 1883.

MEMORANDUM.—The above-named defendant is notified that unless she enters her appearance in the clerk's office of said court on or before the day to which the above writ is returnable the complaint will be taken against her as confessed and a decree taken accordingly.

S. RODMOND SMITH,
Clerk U. S. Circuit Court, said District.

Upon which subpœna the marshall returned as follows:

19 *Marshal's Return.*

I certify that on the thirty-first day of January, 1883, at Wilmington, in my district, I personally served the within writ on the within-named Elizabeth B. McComb (executrix) by showing to her

the same, with the seal of the court thereon, and leaving with her a copy thereof.

So answers—

H. H. McMULLEN,
U. S. Marshal, Dist. of Del.

FEBRUARY 26, 1883.

This day came the defendant, by her solicitors, Messrs. Bates & Harrington, and enters an appearance.

APRIL 2ND, 1883.

This day came the defendant, by her solicitors, and moved the court for an extension of time to file her answer, and thereupon the court made the following order:

And now, to wit, this second day of April, A. D. 1883, upon motion of Austin Harrington, Esq., defendant's solicitor, the time for filing answer in the above cause is extended for thirty days.

20

MAY 2, 1883.

This day came the defendant, by her solicitors, and moved the court for an extension of time to file her answer, and thereupon the court made the following order:

And now, to wit, this second day of May, A. D. 1883, upon motion of Austin Harrington, Esq., defendant's solicitor, the complainants' solicitors consenting, as per paper-writing filed, the time for filing answer is extended for two weeks.

Agreement of Counsel for Extension of Time.

U. S. C. C.

WILMINGTON, DEL., *May* 2, 1883.

SNYDER'S EX'R
vs.
McCOMB'S EX'R
} In Equity.

It is agreed that the time for filing answer in the above case be extended for two weeks from date.

GEO. GRAY,
Sol. for Compl't.

MAY 22, 1883.

This day came the defendant, by her solicitors, and moved
21 the court for an extension of time to file her answer, and thereupon the court made the following order:

And now, to wit, this twenty-second day of May, A. D. 1883, upon motion of defendant's solicitors, Messrs. Bates & Harrington, the time for filing answer is extended until the first Monday in July next.

JULY 2ND, 1883.

This day came the defendant, by her solicitors, Messrs. Bates & Harrington, and filed her answer, as follows:

Answer.

The answer of Elizabeth B. McComb, sole executrix of the last will and testament of Henry S. McComb, late of the city of Wilmington, in the State of Delaware, now deceased, to the bill of complaint filed against her in the circuit court of the United States in and for the district of Delaware, in the third circuit, by George A. Frink, of the city of New York, in the county of New York and State of New York, a citizen of the State of New York, and Esther S. Snyder, of the city of New York, in the county of New York and State of New York, a citizen of the State of New York, as administrator and administratrix of the goods, chattels,
22 and credits of C. Brown Snyder, late of said city of New York, now deceased.

This defendant, now and all times hereafter saving and reserving to herself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, insufficiencies, and imperfections in the said bill of complaint contained, for answer thereunto, or to so much or such parts thereof as she is advised it is material for her to make answer unto, answering, says—

That she is informed and believes it is not true and she denies that, otherwise than as is hereinafter mentioned, the said Henry S. McComb prior to the 23rd day of November, in the year eighteen hundred and sixty-nine, held in his own name, in trust for one Josiah Bardwell, an original subscription of sixty thousand dollars in the Southern Railroad Association, or that as such trustee for said Josiah Bardwell the said Henry S. McComb became or was entitled to one twenty-fifth interest in all the property and affairs of said association and in all the profits to be derived from the business thereof; and upon her information and belief she alleges the
23 truth in that behalf to be that the said Henry S. McComb did in his own name make a subscription to the capital stock of the said Southern Railroad Association for the sum of sixty thousand dollars, qualifying his subscription by adding thereto the signature "trustee;" but, as this defendant is informed and believes, the trust indicated by such qualified signature was a trust in favor of the wife of the said Josiah Bardwell upon her or her husband paying the amount of the said subscription and paying to the said Henry S. McComb all such indebtedness as the said Josiah Bardwell had theretofore incurred or should incur to the said Henry S. McComb in his dealings with the said Henry S. McComb.

As this defendant is informed and believes, it is not true and she denies that after the making of the said subscription or before the said 23rd day of November, in the year eighteen hundred and sixty-nine, said association had, pursuant to the terms of its articles of association or otherwise, increased its capital by the amount of five hundred thousand dollars as a dividend among the members of said association of the earnings and profits thereof, although she
24 admits that, as she is informed and believes, the said asso-

ciation had, pursuant to its articles of association, in fact, increased its nominal capital by obtaining additional subscriptions to such nominal capital.

And, as she is informed and believes, it is not true and she denies that one twenty-fifth part of said alleged increase or of any such increase was subscribed for or taken by the said Henry S. McComb as trustee for said Josiah Bardwell otherwise than in the manner hereinabove stated in respect to said original subscription, if at all, and she says that otherwise than as is herein in this answer stated it is not true, and she denies that such alleged subscription was taken by the said McComb or the interest in said association and its property and affairs and in the profits of its business acquired thereby were held by the said Henry S. McComb in trust for the said Josiah Bardwell, as alleged in said bill, and upon her information and belief she says that otherwise than as is herein in that behalf alleged it is not true, and she denies that on and prior to said twenty-third day of November, in the year eighteen hundred and sixty-nine, there had been paid by the said Bardwell on
25 account of said original subscription seventy per cent. thereof or that thereafter there were paid by the said C. Brown Snyder all or any sums that were required to be paid by said association upon or by reason of such subscription, and upon her information and belief she alleges the truth in that behalf to be that there had been furnished by said Josiah Bardwell on account of said subscription of sixty thousand dollars about seventy per cent. thereof, but that a portion of the sum so furnished by the said Bardwell consisted of moneys borrowed by the said Bardwell from the said Henry S. McComb or raised by him upon the credit of the said Henry S. McComb.

As this defendant is informed and believes, it is not true and she denies otherwise than as is hereinafter in that behalf alleged that, about two months or at any time prior to said 23rd day of November, said Josiah Bardwell, for and in consideration of full or other value paid to him therefor by said C. Brown Snyder, sold and transferred to said Snyder all his interest in said subscription so alleged in said bill to have been held in trust for said Bardwell by said Henry S. McComb or thereupon required said McComb to
26 acknowledge that he held such subscription in trust for said C. Brown Snyder or that said McComb had notice of said alleged payment; and upon her information and belief she alleges the truth in that behalf to be that, subject to all claims of the said Henry S. McComb upon the said Josiah Bardwell and upon the said subscription and the interest acquired thereby and subject to the beneficial interest of the wife of the said Bardwell in said subscription and the interest evidenced or acquired thereby, the said Josiah Bardwell did, about two months prior to said 23rd day of November, 1869, transfer to said Snyder whatever interest the said Bardwell had in said subscription of sixty thousand dollars, and that said Bardwell received from said Snyder some consideration therefor; and, while admitting upon her information and belief that it is true that on or about the 23rd day of November, 1869, the said Henry S. McComb

executed and delivered to the said Josiah Bardwell the paper-writing in that behalf in said bill of complaint set forth and therein called a declaration of trust, it is not true and she denies that the same was made thereupon or upon the consideration stated in
27 the first three paragraphs of the said bill of complaint or either of them or that the said Henry S. McComb executed or delivered to said C. Brown Snyder the said paper-writing or the said alleged or any declaration of trust.

And, as she is informed and believes, it is not true and she denies that thereafter the said Henry S. McComb held the said subscription and all accretions thereto and all the interest in the property, affairs, and profits of said Southern Railroad Association acquired or represented thereby or in any manner belonging or accruing to the owner or holder of the same in trust for the said C. Brown Snyder and not otherwise, and on the contrary she alleges upon her information and belief that the said Henry S. McComb held the said subscription and all accretions thereto and all the interest in the property, affairs, and profits of the said Southern Railroad Association acquired or represented thereby or in any manner belonging or accruing to the owner or holder of the same pursuant to an agreement with the said Josiah Bardwell as security to the said Henry S. McComb for the repayment of all sums due or
28 thereafter accruing to him from the said Josiah Bardwell and then in trust for the wife of the said Josiah Bardwell, and only under any trust or accountability to the said C. Brown Snyder after satisfaction of the aforesaid prior claims thereon; and upon her information and belief she alleges that the said Josiah Bardwell left his wife him surviving, and that the said wife of the said Bardwell had and has an interest in said subscription and the proceeds and successors or representatives thereof and substitutes therefor, and that the said Josiah Bardwell did during his lifetime become largely indebted to the said Henry S. McComb, and that no part of such indebtedness has ever been paid.

As she is informed and believes, it is not true and she denies that the interest in the said bill alleged to have been owned and held by the said Henry S. McComb in trust originally for the said Bardwell and afterwards for said Snyder became and was represented by a corresponding and proportionate share and interest in the corporation in that behalf mentioned in the said bill and the capital stock thereof, although she admits that after the incorporation
29 of the Southern Railroad Association the interest represented by the said subscription for sixty thousand dollars and acquired by virtue thereof was represented by a corresponding and proportionate share and interest in said corporation and the capital stock thereof.

And, as she is informed and believes, it is not true and she denies that the said Henry S. McComb, as trustee, as alleged in said bill of complaint, for the said C. Brown Snyder, or otherwise than as in this answer stated and set forth, became or was entitled to such proportionate share and interest in the said corporation and the capital stock thereof or of all the benefit and advantage accruing therefrom,

or that thereupon as such trustee he acquired or exercised the control and management of the same.

As she is informed and believes, it is not true and she denies upon her information and belief that the said Southern Railroad Association and the said corporation made or realized large profits, benefits, or advantages, or that the equitable share or interest of the said C. Brown Snyder in the said subscription and in the capital
30 stock of the said corporation alleged in said bill of complaint to have been held in trust for him by the said Henry S. McComb became very valuable, or that the said Henry S. McComb received or derived great or any profit, benefit, or advantage therefrom, or that the said Henry S. McComb furthermore or otherwise received or derived great or any profit, benefit, and advantage from his own operations in and about and with the business and property of the Southern Railroad Association before and after its incorporation, or that in such alleged profit, benefit, and advantage the said C. Brown Snyder became or was entitled to his own proper share or proportion by virtue or by reason of the aforesaid alleged trust in his favor; and she alleges upon her information and belief that if the said Henry S. McComb received or derived any profit, benefit, or advantage from his own operations in or about or with the business or property of the Southern Railroad Association either before or after its incorporation such benefit, advantage, and profits was received and derived by him in his own right and interest as a stockholder of the said corporation, and that said Henry S. McComb was
31 such stockholder and part proprietor.

And, as she is informed and believes, it is not true and she denies that the said Henry S. McComb at any time converted to his own use or appropriated or disposed of for his own personal and individual benefit and gain the whole of the said stock alleged in said bill to have been then held by him under and upon the alleged trust in said bill of complaint set forth, or that such stock then consisted of eight hundred shares of the capital stock of the said Southern Railroad Association, or that such alleged or any conversion occurred after the said Henry S. McComb had received or derived great benefit, advantage, and profits from the said subscription or the said proportionate share of the capital stock aforesaid, or that the same occurred without the consent or knowledge of the said C. Brown Snyder or in violation of the alleged or any duties of the said Henry S. McComb as such alleged or other trustee, as alleged in said bill, or in violation of the alleged or of any rights of the said C. Brown Snyder in the premises, or that at the time of such alleged or other conversion or appropriation the said capital stock
32 was worth at least the sum of one hundred and twenty-five dollars per share, or that such alleged or any conversion of such stock was concealed by the said Henry S. McComb or was never discovered by the said C. Brown Snyder in his lifetime, or that the same was not discovered by the complainants until within the period of six months last before the bringing of this suit, or that the same remained concealed or undiscovered without any fault or

laches on the part of the said C. Brown Snyder or on the part of the said complainants until within the period last aforesaid.

As this defendant is informed and believes, it is not true and she denies that the said Henry S. McComb wholly failed or neglected to account to the said C. Brown Snyder or to the complainants as his administrator and administratrix for the acts and doings of the said Henry S. McComb in and about his aforesaid alleged or other trust or for the moneys, stock, and profits and the various benefits and advantages alleged or otherwise received or acquired by him, the said Henry S. McComb, in or about the same, or with which as such alleged or other trustee for the alleged benefit of said C.
33 Brown Snyder he was or at any time became justly chargeable; and upon information and belief she alleges the fact to be that the said Henry S. McComb did so account without being requested so to do; and upon information and belief she says it is not true and she denies that the said Henry S. McComb was requested so to do at any time within seven years next before the bringing of this suit; and, as she is informed and believes, it is not true and she denies that no part of the alleged profits, benefits, or advantages in said bill alleged to have been derived or realized by the said Henry S. McComb from the said capital stock of the said association or from said subscription or with which the said Henry S. McComb became properly chargeable as such alleged or other trustee has ever been transferred or paid over to the said C. Brown Snyder or to the complainants as such administrator and administratrix; and, as she is informed and believes, it is not true and she denies that without an accounting in respect thereof the complainants are unable to state what amount of money was held by the said Henry S. McComb as such alleged or other trustee or was justly chargeable in favor or for the benefit of the said C.
34 Brown Snyder and against the said Henry S. McComb as such alleged or other trustee at the time of his death; and upon information and belief she says that it is not true and she denies that the amount of such or any money to which the complainants are entitled is very large or large in any degree or amounts to any sum.

And, as she is informed and believes, it is true and she admits that the said C. Brown Snyder died at the said city of New York on the 18th day of July, in the year eighteen hundred and eighty-two, intestate, and that the complainants were on the 25th day of November in said year duly appointed by the surrogate of the county of New York administrator and administratrix of the goods, chattels, and credits which were of said C. Brown Snyder, and that they have duly qualified as such and taken upon themselves the administration thereof; but upon information and belief she alleges that the said complainants have never qualified as such administrator and administratrix of such goods, chattels, and credits, or that they have taken upon themselves the administration thereof within the State of Delaware or within the judicial district of Delaware.
35 And this defendant says that it is true and she admits that the said Henry S. McComb died on or about the 30th day of

December, in the year eighteen hundred and eighty-one, having first duly made, published, and declared his last will and testament in due form of law, wherein and whereby he nominated and appointed the defendant, Elizabeth B. McComb, to be the executrix thereof, and that the said last will and testament has been duly proved before and admitted to probate by the register of wills at Wilmington, in and for the county of New Castle and State of Delaware, and that letters testamentary were duly issued thereon by said register to this defendant, who has duly qualified as such executrix and taken upon herself the burden of the execution of said will.

And this defendant, further answering upon her information and belief, says that the alleged or supposed cause or causes of action and suit and grievances mentioned in the said bill of complaint did not, nor did either of them, accrue to the said C. Brown Snyder nor to the complainants as his administrator and administratrix within two years next before the bringing of this suit; and she prays the same benefit of this defence as if she had specially pleaded
36 the same in bar of the said bill.

And this defendant, further answering, says upon information and belief that the said supposed cause or causes of action and suit and grievances mentioned and set forth in the said bill of complaint did not, nor did either of them, accrue within six years next before the bringing of this suit; and she prays the same benefit of this defence as if she had specially pleaded the same in bar of the said bill.

And this defendant, further answering, says upon her information and belief that the said supposed cause or causes of action, suit, or grievances did not, nor did either of them, accrue within ten years next before the bringing of this suit; and she prays the same benefit of this defence as if the same had been specially pleaded in bar of the said bill.

And this defendant further says that she is advised and believes the matters and things stated and set forth in said bill do not constitute such a case as by the rules and practice of a court of equity is cognizable by this court sitting in equity; and she prays the same benefit of this defence as if she had specially pleaded
37 the same or demurred to the said bill.

And this defendant denies all and all manner of combination and confederacy charged against her in said bill; without this, that any other matter or cause or thing contained in said bill material or necessary for this defendant to make answer unto, not herein and hereby well and sufficiently answered, confessed or avoided, traversed or denied, is true to her own knowledge and belief.

All of which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct; and she prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

E. B. McCOMB, *Ex.*

BATES & HARRINGTON,
Sol's for Defendant.

F. N. BANGS,
Of Counsel for Defendant.

UNITED STATES OF AMERICA, } ss:
District of Delaware, }

38 Elizabeth B. McComb, being duly affirmed, deposes and says that as executrix of the last will and testament of Henry S. McComb, deceased, she is the defendant in the foregoing answer named; that she has read the foregoing answer subscribed by her and knows the contents thereof, and that the same is true of her own knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

And, further, that the matters and things contained and set forth in said answer, so far as they relate to her acts and deeds, are true, and so far as they relate to the acts and deeds of other persons she believes them to be strictly true.

E. B. McCOMB, *Ex.*

Affirmed and subscribed to before me this second day of July, A. D. 1883.

[SEAL.] HENRY R. DU PONT,
Notary Public.

39 NOVEMBER 5TH, 1883.

This day came the complainants, by their solicitor-, and filed their replication as follows:

Replication.

In the Circuit Court of the United States for the Dist. of Delaware.

GEORGE A. FINK and ESTHER S. SNYDER, Administrators of the Goods and Chattels and Credits of C. Brown Snyder, Late of the City of New York, in the State of New York, Deceased,
vs.
ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, Late of the City of Wilmington, in the State of Delaware, Deceased. } In Equity.

40 The complainants, by Thomas F. Bayard and George Gray, their solicitors, file the following replication to the answer of the above defendants:

The repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifest insufficiencies of said answer, for replication thereunto say—

That they will aver, maintain, and prove the said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants.

Without this, that any other matter or thing whatsoever in said answer contained material or effectual in law to be replied unto and herein and hereby sufficiently and well replied unto, confessed

or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to verify, maintain, and prove as this honorable court shall direct.

And they humbly pray as in and by their said bill they have already prayed.

THOS. F. BAYARD,
GEO. GRAY,
Solicitors for Complainants.

41 And at the succeeding June term, 1884, October term, 1884, June term, 1885, October term, 1885, June term, 1886, October term, 1886, and June term, 1887, of the said circuit court of the United States for the district of Delaware this cause was, with the other causes therein pending undetermined, continued.

And afterwards, to wit, at a stated term of the said circuit court, begun and held at the city of Wilmington on the third Tuesday (being the 18th day) of October, A. D. 1887, to wit, on the twelfth day of June, A. D. 1888—present, the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States assigned to this circuit, presiding, and the Honorable Leonard E. Wales, district judge—the following proceedings were had, to wit:

42 GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of the Goods, Chattels, and Credits of C. Brown Snyder, Late of the City of New York, in the State of New York, Deceased,
vs.
ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, Late of the City of Wilmington, in the State of Delaware, Deceased.
No. 96. In Equity.

JUNE 12TH, 1888.

The printed copy of the testimony and exhibits on each side received and filed as the evidence in said cause; which said copy is in the words and figures following, to wit:

43 United States Circuit Court, District of Delaware, Third Circuit.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix, &c.,
against
ELIZABETH B. MCCOMB, Executrix, &c.

Deposition of Francis C. Cross, taken *de bene esse* before William E. Zabriskie, Esq., notary public of the State of New York, at No. 48 Wall street, New York city, pursuant to the annexed notice.

FEBRUARY 19, 1884—4.30 p. m.

Present: Mr. Wm. G. Wilson, for complainants; Messrs. F. N. and F. S. Bangs, for defendant.

FRANCIS C. CROSS, being duly sworn by said notary, testified as follows:

Direct examination by Mr. WILSON:

Q. 1. Did you know Mr. C. B. Snyder?

44 A. I did.

Q. 2. Mr. Snyder is now dead?

A. I am so informed by his family.

Q. 3. Did you know Mr. Henry S. McComb in his lifetime?

A. I did.

Q. 4. Also Mr. J. Bardwell?

A. I did.

Q. 5. Were you present at any interview between them in the year 1874?

A. Yes, sir.

Q. 6. Where did that interview take place?

A. At the Windsor hotel, in one of the parlors on the first floor.

Q. 7. At the Windsor hotel in this city?

A. In this city, on Fifth avenue.

Q. 8. Who was present?

A. Mr. Snyder, Mr. J. Bardwell, Mr. McComb, and myself.

Q. 9. What took place there?

A. There was a variety of conversation at the start in regard to the weather and the magnificence of the Windsor hotel. Finally Mr. Bardwell excused himself to go and see a friend in the

45 hotel. After Mr. Bardwell had left the parlor Mr. Snyder asked Mr. McComb to perform his agreement in regard to the Southern Railroad Association stock. Mr. McComb replied to Mr. Snyder that he had better keep it and do as the other gentlemen were about to do, put in some more money; that it was a good thing and was worth two for one. Mr. Snyder told him that he wished the money, as he desired to foster other interests that were pressing him. Mr. McComb said that he had no money, but he would let him have some notes to the extent of $30,000, and Mr. Snyder replied that he would. If the notes were good he would use

them and would carry the balance for a time. No time was stated, however. Mr. McComb told Mr. Snyder to come down to a meeting that was to be held—as to the time of the meeting I have no recollection—if he would come there he would fix it up with him.

Q. 10. Was Mr. Bardwell present?

A. Not at that time. He came in subsequently, and Mr. McComb suggested that we go to some place of amusement.

Q. 11. Did that end the business?

A. Well, there was some conversation between Snyder and McComb. Snyder explained to Mr. McComb that he was very much in want of money and wanted him to do as he had agreed
46 in regard to the Southern Railroad Association stock, and pressed Mr. McComb pretty hard to do so, and Mr. McComb wished him to come to the meeting that was talked over, I know, several times. On the re-return of Mr. Bardwell, Mr. McComb suggested that we go to some place of amusement, and we four of us started. We went to the San Francisco minstrels somewhere on Broadway. I don't remember between what streets it was.

Cross-examined by Mr. BANGS:

Q. 12. What is your business, Mr. Cross?

A. I am engaged in the storage business.

Q. 13. Where?

A. In the city of Chicago.

Q. 14. Had you any business connection with Mr. Snyder of any kind?

A. Yes, sir.

Q. 15. What kind of connection?

A. I acted as an agent for Strang & Snyder, of which Mr. Snyder was a partner for some years.

Q. 16. Were you connected with him in business at the time of this conversation?

47 A. I held the power of attorney from Mr. Snyder and his wife with reference to some lands in the West; that was all the business I had at that time with Mr. Snyder.

Q. 17. Was there any quarrel on the occasion you mention?

A. I heard no quarreling.

Q. 18. Any angry words?

A. Not any.

Q. 19. Any temper?

A. I did not see any exhibition of temper on the part of any.

Q. 20. You were very much interested in the performance at the minstrels?

A. Well, I can't say that I was, for none of us stayed very long.

Q. 21. How long did you stay?

A. I think we stayed there for an hour, or probably three-quarters; I didn't pay very strict attention.

Q. 22. What did you see at the minstrels?

A. I saw a number of men sitting on the stage with black faces and a pretty large audience.

48 Q. 23. Is that all you remember?

A. I remember that we concluded that it was not very interesting and we left.

Q. 24. Is that all that you remember of the performance?

A. I remember that there was a man named Birch and a man named Backus in the company; they seemed to be the principal performers. I learned that from the programme.

Q. 25. Well, is that all you remember of that performance?

A. Well, I think it is; there was some singing and some jokes, but they were so stale that I didn't pay any attention to them.

Q. 26. You had heard them before?

A. They were stale jokes, to which I didn't attach any importance.

Q. 27. Had you heard the jokes before?

A. I thought so at the time.

Q. 28. Is that all you remember of that performance?

A. I don't think there was any portion of it that impressed me so that I remember it now.

49 Q. 29. Is that all that you remember of that performance?

A. Yes, sir.

Q. 30. Do you remember where you went after the performance?

A. Yes, sir.

Q. 31. Where?

A. I went to the Winchester hotel.

Q. 32. Where di- Mr. Snyder go?

A. I don't know. I left him with Mr. Bardwell and Mr. McComb.

Q. 33. How long were you present at the conversation at the Windsor hotel?

A. The only way that I fix the time was by the time that I left the Winchester hotel, on Broadway, and went to the Windsor, on Fifth avenue, and arrived on Broadway at the minstrels, which covered about an hour's time.

Q. 34. Well, was it an hour?

A. From the time I left the Winchester hotel and went to the Windsor—from the Winchester to the minstrels it was about an hour's time.

Q. 35. How much of that time was occupied in the conversation?

50 A. Well, the conversation relating to the subject-matter of the railroad association?

Q. 36. The conversation that you have stated on your direct examination when Bardwell was away.

A. Well, I should think that Bardwell was absent probably thirty minutes—twenty-five to thirty minutes.

Q. 37. Well, was all that time occupied in conversation about the stock?

A. No; there was other conversation in regard to irrelevant matters.

Q. 38. Well, what other matters?

A. Well, they talked, as I stated, about the hotel and looking out of the window where we could look out—it was a summer's eve—

they were talking about the general character and appearance of the admirable hotel and the weather during part of the time.

Q. 39. How much time was occupied by the conversation about the stock?

A. About the stock?

Q. 40. Yes.

A. Well, I did not fix in my mind as to the time it consumed, because it was——

Q. 41. Well, isn't the short of it that you cannot tell or can you tell?

51 A. Well, I should say probably about twenty minutes of the time was devoted to the conversation that took place, from beginning to end, in regard to the stock.

Q. 42. In regard to the stock?

A. Yes, sir.

Q. 43. A much longer time than it takes for you to repeat it?

A. Well, there was a repetition of the same facts—of the same statements—by both parties; they made it consume a longer time because Mr. Snyder repeated his necessities for money.

Q. 44. Well, that is all that prolonged the conversation—the repetitions of Mr. Snyder?

A. The repeated times that he mentioned Mr. McComb's complying with his agreement and pressing him as to the stock, and then Mr. McComb's urging him to keep it and not part with it, because it was a good thing, and it was probably repeated on Mr. Snyder's part that he could not do that because his pressing engagements were such that he wanted to foster other interests with his money.

Q. 45. He said that more than once?

A. Yes, sir.

52 Q. 46. Well, did they come to any agreement? Did one of them say he would do something and the other say he would do something?

A. Mr. McComb stated that he would let him have thirty thousand dollars in notes, and for him to come down to a meeting that was to take place, the time of which may have been mentioned, but I do not remember what it was.

Q. 47. Well, where was he to come to the meeting?

A. Somewhere around Nassau street.

Q. 48. What meeting?

A. A meeting of some parties connected with the railroad association.

Q. 49. Well, how do you know that?

A. Well, they stated it.

Q. 50. Well, why didn't you mention that in your testimony?

A. Well, the whole subject-matter was upon the railroad association stock.

Q. 51. But you say part of the subject-matter was about that meeting?

A. Well, the meeting was in regard to this stock, as I understood it at the time.

53 Q. 52. Well, why didn't you say so before—that is what I enquired?

A. Well, if I omitted it——

Q. 53. You forgot it, didn't you?

A. It was very strongly impressed upon my mind.

Q. 54. Well, you forgot it just now when you were testifying, didn't you?

A. Yes, sir; I could not recall every word that was stated.

Q. 55. Well, you forgot that just now, didn't you?

A. If I didn't state it I must have done so.

Q. 56. Well, did Mr. Snyder agree to come to the meeting?

A. I do not think that there was any consent at the time given to going to the meeting by Snyder.

Q. 57. Whose notes did McComb speak of?

A. Well, as I said, he told Mr. Snyder he had no money, but he had some notes he would let him have—thirty thousand dollars. I remember that that sum he mentioned.

Q. 58. Whose notes?

A. Well, if he stated it I do not recollect.

54 Q. 59. Didn't he say they were notes of the Southern Railroad Association?

A. Well, if he did state it so I don't recollect.

Q. 60. Don't you recollect whether he did or not?

A. I have no recollection as to whose notes they were.

Q. 61. Well, have you any recollection as to whether he said whose notes they were?

A. I say I don't recollect whether he said so or not.

Q. 62. Well, you didn't understand that he mentioned his own notes, did you?

A. No; I don't recollect that he mentioned whose notes they were.

Q. 63. Well, he didn't say they were his own notes, did he?

A. No; not to my recollection. I don't think that he stated that they were his own notes.

Q. 64. Didn't Snyder say that if the notes were good they would satisfy him?

A. Yes, sir; he did.

Q. 65. Well, didn't McComb then tell him whose notes they were?

A. As I said before, I don't recollect.

55 Q. 66. Well, was there any question or conversation about McComb's notes being good or not?

A. No, sir.

Q. 67. Well, wasn't there something said about McComb giving his own note for something?

A. There was something said by Mr. Snyder to this effect: that if he would furnish him with this thirty thousand dollars he would carry the balance himself.

Q. 68. Wasn't there something said about giving McComb's own note for something?

A. I don't recollect that Mr. McComb mentioned that in my hear-

ing, or at least my recollection does not serve me whether he mentioned any notes to be given by himself.

Q. 69. Well, was there anything mentioned as to be given besides the thirty thousand dollars?

A. Only that Mr. Snyder stated that he would carry the balance himself.

Q. 70. Did Snyder have any paper with him?

A. I didn't see any at the time.

Q. 71. Any document, I mean.

A. I didn't see any.

Q. 72. Didn't McComb ask for a document?

A. No, sir; not in my hearing.

56 Q. 73. Well, then, what did you understand Snyder to agree to do?

A. I understood that Snyder agreed to accept the notes if they were good and he could use them.

Q. 74. And he agreed to come to the meeting?

A. I did not hear him agree to it; he may have done so.

Q. 75. Did McComb say anything more than this, that if he would come to the meeting he would give him the thirty thousand dollars of notes and that this would fix it up?

A. Yes, sir.

Q. 76. That was it, wasn't it?

A. He told him that if he would come to the meeting he would fix it up with him.

Q. 77. And partly by giving him thirty thousand dollars of notes?

A. That was one of the promises he made, to let him have thirty thousand dollars' worth of notes.

Q. 78. Well, you didn't understand those to be McComb's notes, did you?

A. I didn't understand whose notes they were.

57 Q. 79. You remember having testified in the suit between Snyder and McComb while they were both living, don't you?

A. Yes, sir; in the city of Boston.

Q. 80. No-, don't you remember these questions and answers on your examination there in Boston: "Q. Then the treaty was that McComb was to give Snyder somebody'- else notes for thirty thousand dollars and his notes for the balance and carry it and Snyder was to fix it up? A. Snyder was to carry the balance. Q. Colonel McComb was to give him Southern Railroad Association notes for thirty thousand dollars and his own notes for the balance, which Snyder was to carry and fix it up? A. Yes, sir." Don't you remember having testified to that?

A. Now, if you will please read that again.

(Question repeated.)

A. Well, if I answered——

Q. 81. The only question is whether you remember testifying to that.

A. I don't recollect it in the form in which you read it. I recollect this, that Mr. McComb promised to give Mr. Snyder thirty

thousand dollars of somebody's notes and that Mr. Snyder said that if he would do that he would carry the balance.

58 Q. 82. Well, aren't you mistaken; didn't he say he would give him thirty thousand dollars of anybody's notes instead of somebody's?

A. I say my recollection does not serve me as to whose notes they were to be.

Q. 83. Well, they were to be somebody's?

A. Yes, sir; they were to be somebody's.

Q. 84. Now, you have not quite answered the question; don't you remember having testified to what I read to you in Boston?

A. Well, I say if I answered "yes" to such a question as you have read there——

Q. 85. Well, I don't want to know the consequences of your answering "yes."

Mr. WILSON: Well, I submit he should be allowed to finish his answer.

Mr. BANGS: Well, I object to his finishing his answer, as it is no answer to the question.

Mr. WILSON: Well, we will take it subject to objection. State your answer as you wanted to give it. It is in regard to your so testifying.

The WITNESS: I say that if I did I did it under misappre-

59 hension of the question—if I answered that he was to give thirty thousand dollars of the railroad association notes and his own notes for the balance and Mr. Snyder was to carry it; I did not so understand it.

Q. 86. Now, did you so testify is the question.

A. I did not so intend to do.

Q. 87. Well, did you so testify is the question.

A. Well, I don't recollect now, because that is some years ago.

Q. 88. Haven't you read over your testimony given there before being examined here to-day?

A. I read a portion of it.

Question 89. Didn't you read the whole of it?

A. No, sir.

Q. 90. How much of it did you read?

A. I read as far down as to the place where we went—well, where we were smoking, and I read probably half of it.

Q. 91. You read down to where you were smoking?

A. Yes, sir; to where I testified we were smoking.

Q. 92. You found it correct, did you?

A. Yes, sir. I remember that feature of it distinctly.

60 Q. 93. As far as you read it you found it had been correctly taken down, did you?

A. Yes, sir.

Q. 94. Well, didn't you testify to this: "Q. Now, was that all that Snyder was to do—go to the meeting? Was he to do anything else? A. He was to go there and fix it up." Didn't you testify to that?

A. Yes, sir.

Q. 95. That was true, wasn't it?

A. That was the proposition from McComb—that he should go to the meeting and fix it up.

(Answer objected to by Mr. Bangs as not responsive.)

Q. 96. Is that true what you then testified to—that he was to go there and fix it up?

A. As to Mr. McComb's request it is.

(Answer objected to by Mr. Bangs as irresponsive.)

Q. 97. Won't you answer that question? Is it true, as you then testified, that Snyder was to go there and fix it up?

(Objected to by Mr. Wilson as unintelligible without the context being read.)

A. I say it was understood on the part of McComb that Snyder was to go there and fix it up. Whether Snyder consented or not I never testified, because I never heard him consent.

61 Q. 98. Well, then, if the stenographer has you down as testifying that he was to go there and fix it up that is a mistake of the stenographer, is it?

A. It was the conditions of Mr. McComb that I stated.

Q. 99. That Snyder was to go to the meeting and fix it up?

A. Yes, sir.

Q. 100. And for that Snyder was to give him stock in the Southern Railroad Association, wasn't he?

A. For what?

Q. 101. For whatever McComb was to give him.

A. He was to give him an interest that he had in it.

Q. 102. Didn't Snyder say that he would bring some paper to the meeting?

A. I didn't hear him say so.

Q. 103. Did you hear any reference to any paper?

A. No; I didn't hear anything in reference to any paper. I heard him refer to the agreement between them, but it was not stated whether it was a verbal or a written agreement.

Q. 104. Is this the part you read down to: "It was in June and it was after seven o'clock and we had no gas lit in the room

62 and I think I was smoking, and I think Mr. McComb was smoking. Q. Col. McComb was smoking? A. Or Josiah Bardwell, one of the two; there were two of us smoking. Q. You are positive that Col. McComb was smoking? A. No; I won't be positive whether it was he or Bardwell, but I know two of us were smoking in the room." You read down to that, did you?

A. Yes, sir.

Q. 105. Do you remember anything more about that now than when you testified before?

A. Well, no. I remember that there were two of us smoking.

Q. 106. Were you smoking?

A. Yes, sir.

Q. 107. You and who else?

A. Well, it was either Mr. Bardwell, as I said, or Mr. McComb.

Q. 108. And was there some conversation about cigars?

A. Well, I don't remember which one handed me a cigar, but one of them did, either Bardwell or McComb.

Q. 109. Was there any conversation about cigars?

A. I don't remember any particular conversation about cigars.

Q. 110. Do you remember testifying to this: "There was
63 something further said that seems too vague in my recollection to state"?

A. Yes, sir; I think I have some recollection of making some such statement as that.

Q. 111. Well, was that true?

A. Yes, sir; and it remained so.

Q. 112. It remains true now?

A. Yes, sir.

Q. 113. You remembered it, however, quite as freshly then as you do now?

A. Well, it was because of the—the vagueness arose out of an interruption at the time.

(Answer objected to by Mr. Bangs as irresponsive.)

Q. 114. I ask if you remembered it as freshly when you testified in Boston as you do now.

A. Remembered what?

Q. 115. The conversation; is your memory any fresher to-day than it was when you testified in Boston?

A. No; I don't think it is any more so. It is as fresh.

Q. 116. Do you remember anything now that you did not remember then?

A. Well, there are one or two incidents that happened in
64 the course of the time that I spent with them that I have thought of since.

Q. 117. In conversation or what?

A. Well, no; an incident that occurred during the evening.

Q. 118. Outside of the conversation, do you mean?

A. Yes, sir.

Q. 119. Well, I am not asking you about that; you told the conversation then as you remembered it, didn't you?

A. Yes, sir.

Q. 120. And you don't remember it any better now?

A. No; I do not think I do.

Q. 121. Now, see if this is what took place: You and Snyder went to the Windsor hotel and stepped up to the register and looked over the register, and as you turned around to look around the office you saw Mr. McComb and Mr. Bardwell coming into the front door of the hotel, and you walked towards them, and you greeted each other—all four of you—and Mr. McComb invited you into his parlor, on the same floor, in the front of the house, and you went in there and sat down; that there were some general remarks made about the weather and the hotel, and Mr. Bardwell excused
65 himself and said that he wished to see a friend in the house

and went out. After he had gone out Mr. Snyder told Col. McComb that he had come to see him about performing his agreement in taking his stock of the Southern Railroad Association, and Col. McComb told him that he ought not to part with it; that it was a very good thing, and that he ought to do as other gentlemen were doing—put in some more money—and you think he stated to take bonds. Mr. Snyder said he had no money to put in; that he wanted to foster other interests, and he wanted the money on this. Col. McComb told him he had no money. There was something further said that seems too vague in your recollection to state, but Col. McComb said that he had some notes to the amount of thirty thousand dollars, and Snyder told him if the notes were good he could use them, and he would take the notes and carry the balance for him, and Col. McComb said to Snyder, "You come down to the meeting" that was to take place; you don't remember what time, but there was some time mentioned, you think, but you don't remember what it was, and just about that time Mr. Bardwell returned to the parlor and stayed there a very few minutes, and there was a proposition made to go out and go to some place of amusement, which you all did.

66 A. Yes, sir.

Q. 122. That is the conversation, isn't it?

A. Yes, sir.

Redirect examination.

By Mr. WILSON:

Q. 123. What was the incident which caused a vagueness in your recollection about a part of the conversation?

A. The windows were open and there was an omnibus and a carriage that caused me to go to the window. I remember that incident, and that is what gave rise to my not hearing the cause of the noise and confusion that took place in front. The vagueness that I speak of arose from that circumstance.

Q. 124. Vehicles came into collision, you mean?

A. Well, whether they positively collided or not, there was an angry controversy between some persons connected with the carriage and the driver of the omnibus and the window was open.

Recross-examination.

By Mr. BANGS:

Q. 125. Mr. Bardwell is dead, isn't he?

A. I am so informed.

67 Q. 126. How long ago were you so informed?

A. Oh, I don't recollect the first time that I heard of it, but I visited Boston and was told by a gentleman in Young's hotel.

Q. 127. How long ago? The point is not with me who told you, but when you first heard of it.

A. As to the time?

Q. 128. When did you first learn it?
A. Well, I don't recollect the date.
Q. 129. How many years ago?
A. Oh, it must be——
Q. 130. Forty years ago?
A. No, sir; it is not over seven, I don't believe. I don't remember the exact time, but——
Q. 131. About seven years ago. That is about the time he died, so you may as well say so.
A. Well, I don't recollect the time, but I know I heard of it in that way, because he died in Young's hotel, and a gentleman was telling me there about it.

Adjourned to February 21, 1884, 4.30 p. m., same place.

68 Circuit Court of the United States for the District of Delaware.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, Deceased,
ag'st
ELIZABETH C. MCCOMB, Executrix, &c., of Henry S. McComb, Deceased.

Testimony on behalf of the complainants in the above-entitled suit, taken before S. Rodmond Smith, Esq., standing examiner of the said court, in room No. 10, United States court-house, Ninth and Chestnut streets, in the city of Philadelphia, Pa., on Saturday, March 8, 1884, at 10 o'clock a. m.

Present: Messrs. Wm. G. Wilson and George Gray, solicitors for complainants; Messrs. F. N. and F. S. Bangs, for defendant.

69 WILLIAM HENRY BARNES, called as a witness on behalf of the complainants, sworn by the examiner, testified as follows:

By Mr. WILSON:

Q. 1. Where do you reside, Mr. Barnes?
A. Philadelphia, at present.
Q. 2. Did you formerly reside in Pittsburgh?
A. Yes, sir—rather what we call Pittsburg—but it was Allegheny city, across the river; it is substantially the same thing.
Q. 3. During the past twenty years or any part of them have you held official connection with the Pennsylvania Company?
A. Yes, sir.
Q. 4. What has your position been in connection with that company?
A. I was originally secretary and treasurer and subsequently only treasurer.
Q. 5. What position did you hold in 1869 in that company?

A. The Pennsylvania Company was not organized in 1869—was not in existence in 1869.

70 Q. 6. When was it organized?

A. My recollection is, in April, 1871; about April, 1871—early in 1871; let me qualify that; I say "not organized," I mean it did not go into operation; the charter was several years prior to that and the organization was effected, but the Pennsylvania Company did not undertake its function which it now has and has had for twenty years past, or at least since 1871, until some time in 1871; I think some time in April, 1871.

Q. 7. And at that time did you become both secretary and treasurer?

A. Yes, sir; I was the original secretary and treasurer of the company.

Q. 8. And when did your official connection with that company terminate?

A. February 1, 1883.

Q. 9. That company was incorporated under the laws of Pennsylvania, I suppose?

A. Yes, sir.

Q. 10. Did you know, in his lifetime, Henry S. McComb, of Wilmington, Delaware?

A. Yes, sir.

71 Q. 11. Do you know whether or not the Pennsylvania Company had any business transaction with Mr. McComb in the year 1871?

A. Yes, sir; they had.

Q. 12. Do you know of any such transactions relating to the stock of the Southern Railroad Association?

A. Yes, sir.

Q. 13. Please state what those transactions were.

A. They were set forth in a written agreement—written articles—between the Pennsylvania Company and H. S. McComb, bearing date, my recollection is, November, 1871; early in November, 1871; I believe the 8th or 10th.

Mr. WILSON: We call on the defendant's counsel to produce certain certificates of stock of the Southern Railroad Association pursuant to notice.

Mr. BANGS: Pursuant to this notice (handing Mr. Wilson a paper)?

Mr. WILSON: That is the notice.

The notice last above referred to is marked Exhibit 1, March 8, 1884, of which the following is a copy:

72 "U. S. C. C. for District of Delaware. In Equity.

SNYDER'S EXEC'RS
vs.
M'COMB'S EX'R.

To Geo. H. Bates, Esq., solicitor for def't:

SIR: Please produce at the taking of testimony in the above cause, before S. Rodmond Smith, at Ninth and Chestnut streets, in the city of Philadelphia, on Saturday, March 8, 1884, the following certificates of stock of the Southern Railroad Association:

Certificates Nos. 37, 38, 39, 40, 41, 42, for 100 shares each, in name of H. S. McComb.

Certificates Nos. 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, for 100 shares each, in name of C. A. Lambard (except No. 56, which is for 67 shares).

Certificates Nos. 157, 158, 159, 160, 161, 162, 163, 164, for 100 shares each, in name of H. S. McComb, trustee.

Certificates Nos. 178, 179, 180, for 100 shares each, in name of Samuel H. Edgar.

Certificates Nos. 222, 223, 224, 225, 226, 227, 228, 229, 230,
73 231, for 100 shares each, in name of Jacob S. Rogers, trustee.

Yours respectfully, GEO. GRAY,
Sol. for Compl't.

Wilmington, March 3, '84."

Mr. BANGS: Pursuant to the notice produced and which has just been marked Exhibit No. 1, March 8, 1884, we produce certificate No. 37 for 100 shares of the stock of the Southern Railroad Association in the name of H. S. McComb, the certificate dated October, 1870, on the back of which is this endorsement:

"For value received, I, H. S. McComb, do hereby sell, assign, and transfer to the Pennsylvania Company within 100 shares of the capital stock of the Southern Railroad Association for $100 each, standing in —— name on the books of the company and represented by within certificate, and do hereby irrevocably constitute and appoint —— attorney to execute a surrender and cancellation of the within certificate, and also to do all things requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary or be required by the
74 regulations of the said company in that behalf, with full power of substitution in the premises. Dated this — day of ——, 18—.

H. S. McCOMB.

In the presence of—
—— ——."

We also produce certificate No. 38, of the same date, for 100 shares of the same stock, in the name of the same party, and the certificate bearing the same endorsement.

Also certificate No. 39, in all respects the same as No. 38, with same endorsement.

Also certificate No. 40, in all respects the same as No. 39, that is with the same endorsement.

Also certificate No. 41, in all respects similar to No. 40, with the same endorsement.

Also No. 42, in all respects the same as 41, with the same endorsement.

Also No. 45, the same as the last, except that the holder described in the certificate or owner is C. A. Lambard. There is the same endorsement as before except that it is dated the 6th of December, 1871, and signed Charles A. Lambard, in presence of H. K. Smith.

75 Also certificate No. 46, in all respects the same as 45, with the same endorsement.

Also certificate No. 47, in all respects the same as 46, with the same endorsement.

Also certificate No. 48, in all respects the same as No. 47, with the same endorsement.

Also No. 49, in all respects the same as 48, with the same endorsement.

Also No. 50, in all respects the same as No. 49, with the same endorsement.

Also No. 51, the same in all respects as No. 50, with the same endorsement.

Also No. 52, in all respects the same as 51, with the same endorsement.

Also 53, the same in all respects as 52, with the same endorsement.

Also No. 54, the same in all respects as 53, with the same endorsement.

Also 55, the same in all respects as No. 54, with the same endorsement.

Also No. 56, the same as No. 55, with the same endorsement except that the number of shares certified to in No. 56 is 67.

76 Also No. 157, the same as 55—that is, for 100 shares—except that the holder's and owner's name is stated to be H. S. McComb, trustee. This bears the same endorsement as the certificates already produced in the name of H. S. McComb.

Mr. WILSON: As No. 37, say?

Mr. BANGS: Yes, sir; except that the endorsement is signed H. S. McComb, trustee.

Also 158, the same in all respects as 157, with the same endorsement.

Also 159, the same in all respects as 158, with the same endorsement.

Also 160, the same in all respects as 159, with the same endorsement.

Also 161, the same in all respects as 160, with the same endorsement.

Also 162, the same in all respects as 161, with the same endorsement.

Also 163, the same in all respects as 162, with the same endorsement.

Also 164, the same in all respects as 163, with the same endorsement.

Also 178, the same as 164, except that the owner's and
77 holder's name is stated to be Samuel H. Edgar, and it bears the same endorsement as the others, except that the date is November 7, 1871, and the signature to the endorsement is Samuel H. Edgar.

Also 179, the same in all respects as 178, with the same endorsement.

Also 180, the same in all respects as 178, with the same endorsement.

Also Nos. 222, 223, 224, 225, 226, 227, 228, 229, 230, and 231, each for 100 shares of the capital stock of the Southern Railroad Association, of which Jacob S. Rogers, trustee, is declared to be the owner, and each bearing the following endorsement:

"For value received, I, J. S. Rogers, trustee, do hereby sell, assign, and transfer to the Pennsylvania Company the within 100 shares of the capital stock of the Southern Railroad Association of $100 each, standing in my name on the books of the company and represented by the within certificate, and do hereby irrevocably constitute and appoint —— —— attorney to execute a surrender and cancellation of the within certificate, and also to do all things
78 requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary or be required by the regulations of the said company in that behalf, with full power of substitution in the premises. Dated this — day of ——, 18—.

J. S. ROGERS, *Trustee.*

In the presence of—
J. S. CLARK.

August 14, 1882.—I have no interest in this certificate of stock.
J. S. ROGERS, *Trustee.*"

And this is the skeleton form of each certificate:

"No. —. Capital, $2,000,000. — Shares.

(Countersigned) H. S. EDGAR, *Secretary.*

Southern Railroad Association, lessee of the Mississippi Central Railroad Company, incorporated by the States of Tennessee and Mississippi.

This certifies that —— —— is the owner of — shares of one hundred dollars each in the capital stock of the Southern
79 Railroad Association, which shares are transferable in person or by attorney on the books of the company only upon surrender of this certificate.

In witness whereof the said company has caused its corporate seal to be affixed hereto and this certificate to be signed by its president and treasurer and countersigned by its secretary, at the office of the company, in the city of New York, this — day of ——, 187–.

(Signed) H. S. McCOMB, *President.*
JOHN L. KING, *Treasurer.*

Shares, $100 each."

Mr. Wilson calls for certificates numbered 151, 152, 153, and 154 of 100 shares each, made out in the name of Henry Lewis, to which call Mr. Bangs makes no response and no production.

Q. 14. I show you, Mr. Barnes, these certificates which have just been produced by defendant's counsel and described and ask you if those were ever in the possession of the Pennsylvania Company.

A. To the best of my recollection they were.

80 Q. 15. When did they come into the possession of the Pennsylvania Company?

A. That I cannot say, sir.

Q. 16. About what time?

A. I should judge in 1871, about the time the agreements were made.

Q. 17. How long did they remain in the possession of the Pennsylvania Company?

A. My recollection is that they were in the possession of the Pennsylvania Company up to the time of my leaving the service in some form or other—that is, in some hands or other—subject to the control of the Pennsylvania Company. I will answer that in this way: To the best of my recollection they were subject to the control of the Pennsylvania Company up to the time that I left the service of the company.

Mr. Wilson offers in evidence the certificates produced by Mr. Bangs, above specified, stating that he does not care to have them marked, inasmuch as the description herein contained obviates the necessity of so doing.

Q. 18. At the time you have spoken of, in November, 1871, was any money paid to Mr. McComb by the Pennsylvania Company?

A. That I cannot answer definitely. There was a consid-

81 eration paid, unquestionably, under the agreement for 5,000 shares bought.

Q. 19. At what price?

A. $125 a share.

Q. 20. And was that consideration paid?

A. That consideration was paid.

Q. 21. By the Pennsylvania Company?

A. By the Pennsylvania Company?

Q. 22. And to whom?

A. I suppose to Mr. McComb.

Q. 23. To Mr. McComb?

A. I suppose to Mr. McComb; yes, sir.

Q. 24. At the time of this transaction can you state how many

shares altogether of the stock of the Southern Railroad Association were received by the Pennsylvania Company?

A. There were 5,000 shares absolute purchase and 5,000 shares assigned to the Pennsylvania Company in blank, signed by the respective owners of respective certificates for 5,000 shares.

Q. 25. The 5,000 sold outright is the 5,000 you have already mentioned in your testimony?

82 A. Yes, sir.

Q. 26. As sold at $125 a share?

A. Yes, sir.

Cross-examination by Mr. BANGS:

Q. 27. What was the date of this payment of a consideration that you mention?

A. I can't remember, sir; I can't recall it.

Q. 28. Was it all paid in one sum.

A. I can't recall that, either.

Q. 29. Well, how can you recall that it was paid to Mr. McComb if you can't recall when it was nor whether it was paid in one sum?

A. I simply said to the best of my recollection it was paid to McComb.

Q. 30. No; you did not. You said as you supposed.

A. Well, that is my recollection.

Q. 31. Well, the best of your recollection is no recollection at all, then, isn't it?

A. If you interpret it so.

Q. 32. Well, I do interpret it so.

A. All right, sir.

Q. 33. Now, do you consent so—that the best of your recollection is no recollection at all?

83 A. Yes, sir.

Q. 34. Then when you answered that a certain thing was so to the best of your recollection you substantially meant to say that you did not know, didn't you?

A. I say they were paid for at the time of the receipt of them; that is what I want to convey, to the best of my recollection.

Q. 35. Well, to the best of your recollection is no recollection at all, isn't it?

A. Very well.

Q. 36. Well, what is the difference between that and not knowing anything about it?

A. I don't know. I can't argue that sort of things with you.

Q. 37. I am not arguing. I am asking you a question.

A. Well, I can't say any more.

Q. 38. Well, what is the difference between what you style your best recollection, and you also say you have no recollection at all, and not knowing anything about it? What is the difference in your own mind?

(Objected to by Mr. Wilson.)

Q. 39. What is the difference, in your own mind, be-
84 tween not knowing anything about it and the best of your recollection being no recollection at all?

A. I have no answer to make to that question, sir.

Q. 40. Do you know anything about it?

(Objected to by Mr. Wilson.)

A. Yes, sir; I think I do.

Q. 41. How did you get your knowledge?

A. As secretary and treasurer of the Pennsylvania Company.

Q. 42. Well, that alone did not give you knowledge, did it? Did you see anything done?

A. Well, I saw this done as treasurer of the company, their being placed in my custody.

Q. 43. What else did you see done?

A. The handing over to me of the securities which the company had paid for and put in my possession and charged on the books as having cost that much money of the company's funds.

Q. 44. Who handed them over to you?

A. Well, I suppose they may have come by mail or express.

Q. 45. What is your recollection?

85 A. I cannot say positively, sir.

Q. 46. Then you have no recollection?

A. I don't know whether they came by mail or express. They came into my hands as treasurer and I held them as property of the company—as assets for a long while.

Q. 47. Well, that is all you know about it, isn't it?

A. Well, that is a good deal to know, isn't it?

Q. 48. Well, it may be, if you say so, but, whether it be great or little, that is all you know, isn't it?

A. I know that 5,000 shares, and I think I so testified, were the absolute property of the Pennsylvania Company by purchase. I know that fact, because they came into my custody as treasurer and I held them for a number of years as their property and represented them as their securities. Why I don't answer distinctly what payment was made I may, I suppose, explain in this way——

Q. 49. Well, not until I have objected to your explaining. If you will be so good as to say whether you know anything about the fact of payment or not, then there may be room for explanation. Do you know anything about the fact of the payment?

(Objected to by Mr. Wilson as improper.)

86 Q. 50. Do you know anything about the fact of payment?

A. I don't know the absolute mechanical fact of paying for the stock. I don't remember it.

Q. 51. Why do you discriminate between a certain 5,000 as having been absolutely purchased and a certain other 5,000 shares as having come into the possession of the company without being absolutely purchased? How do you know that?

A. I merely know it by our records and by the legends that belonged to the whole transaction.

Q. 52. Who made those records?

A. They were made, as far as any cash transactions were concerned, by my clerk, under my direction, or if cash was not involved they would go through another department by a journal entry and get into the books of the company in that way.

Q. 53. Well, who made that journal entry?

A. Well, it was made by a clerk, under the direction of T. B. Messler, the comptroller.

Q. 54. Then, except so far as you know from actual obser-
87 vation that certificates for 10,000 shares were in the possession of the company, you get your knowledge of the remainder of the transaction from records made by others, do you?

A. Yes, sir; the records of others.

Q. 55. Made by other persons?

A. Yes, sir.

Q. 56. Can you say whether or not at any time while these shares were in the possession of the Pennsylvania Company it received any dividends?

A. It did not.

Q. 57. Did the Pennsylvania Company raise at any time any money on these shares, as far as you know?

A. Not to my knowledge.

Q. 58. Unless I say so I am not calling for anything—for any knowledge that you have acquired merely by reference to records—but I am calling simply for matters within your own knowledge.

A. Yes, sir.

Q. 59. You have no knowledge as to whether it ever did or not?

A. No, sir.

Q. 60. What particular officer of the company had the
88 custody of the certificates for these 10,000 shares?

A. The treasurer.

Q. 61. And that was yourself?

A. Yes, sir.

Q. 62. Do you know whether or not the Pennsylvania Company ever voted upon any of those shares?

A. I do not of my own knowledge; no, sir.

Q. 63. Do you know whether it furnished anybody with any power of attorney or proxy to vote?

A. I might answer that by saying that I saw such a power of attorney recently.

Q. 64. Where?

A. In the office of the Pennsylvania Railroad Company, I think it was.

Q. 65. How long ago?

A. A few days since, it seems to me—well, now, I want to qualify that; whether they were those 5,000 shares they bought outright or the other 5,000 shares I don't know, but I saw a power of attorney.

Q. 66. What I wish to know is if you ever saw any proxy to vote on those shares.

A. Yes, sir.

89 Q. 67. The proxies signed by the Pennsylvania Company?

A. Yes, sir; that is my recollection of it.

Q. 68. In whose favor; who was the attorney or proxy named in the paper?

A. I don't know. My recollection is it was the secretary of the company had it in his charge and went to New York to a meeting.

Q. 69. What was his name?

A. S. B. Ligett.

Q. 70. How came you to see the proxies?

A. I went to the office a few days ago in order to refresh my recollection about these matters, as I had been out of the service of the company for about fifteen months, and had no other means of getting some little items to answer my questions, as far as I could, at this hearing.

Q. 71. That was after you understood that you were to be examined at this hearing?

A. Yes, sir; within five days.

Q. 72. Did that inspection or examination of the books or papers bring to your mind any personal transaction of your own other than the fact that you received these shares which have been
90 produced and had the custody of them for some time?

A. Nothing more than correspondence backwards and forwards, running through a term of years, with gentlemen of the Pennsylvania railroad office, growing out of this transaction.

Q. 73. Well, correspondence in which you took part?

A. Yes, sir.

Q. 74. You saw such correspondence?

A. Yes, sir.

Q. 75. Recently?

A. I did not see the correspondence recently. I saw the paper that referred to the correspondence. You asked me what other transactions I had.

Q. 76. I asked you whether your recent inspection of the books and records of the company brought to your mind any personal transaction of your own—any transaction that you took part in—beyond the mere fact that you received those certificates of stock and had the custody of them for a long while; did that bring to your mind anything else?

A. Shall I modify your question by striking out books and records? What I looked at were letters and copies of agreements.

91 Q. 77. Well, did your inspection, whatever it was——

A. You see we are all very technical, and I want to be as careful as I know how.

Q. 78. You mean you are technical?

A. No, sir; we all are.

Q. 79. Well, we will try not to be.

A. Yes, sir.

Q. 80. Did that inspection, whatever it was, bring to your recollection any personal transaction of your own beyond the mere fact that you received these certificates of stock and kept the custody of them?

A. No, sir.

Q. 81. Did you receive these certificates for 10,000 shares all at once?

A. I think so.

By Mr. WILSON:

Q. 82. You had been subpœnæd to testify in this matter before you made the inquiries for the purpose of refreshing your recollection, had you not?

A. Yes, sir.

Q. 83. Where are the official records of the Pennsylvania Company which relate to the transactions between it and McComb
92 in reference to this Southern Railroad Association stock?

A. In Pittsburg, at the office of the Pennsylvania Company.

Q. 84. Who is the present treasurer of the company?

A. John E. Davidson.

Q. 85. And who is the present secretary?

A. S. B. Ligett.

Q. 86. If you wish to add any explanation to your testimony it is proper for you to do so.

Mr. BANGS: I object as incompetent—I object to the question.

Mr. WILSON: I understood the witness to say, in answer to one of your questions, that he wished to explain an answer, and I merely wished to call his attention to the fact that he has a right to make such explanation now.

The WITNESS: I did qualify that which I had reference to.

Mr. BANGS: I understood he wanted to explain before he made any answer, and I wanted the answer to come first and the explanation afterwards.

93 The WITNESS: I made all the explanation that I wanted to make; I made all the explanation in the answer that I made you and I qualified the answer, and I said the cash transaction would be one thing and the journal transaction was another, and the journal transaction was one that I would not be familiar with; let me explain it to you—I do not think this is any part of the testimony.

Mr. BANGS: Then it is not worth while explaining.

Mr. WILSON: Well, if you think any part of your testimony is liable to misconstruction, you are at liberty to explain it.

The WITNESS: No, sir; only that there may be a suggestion of ignorance on my part, and——

Mr. BANGS: Oh, no; not at all.

The WITNESS: That is the reason I wanted to explain a certain transaction.

Mr. BANGS: Oh, no, sir; not at all, sir.

The testimony of the witness having been read over to him, his examination is continued as follows:

By Mr. BANGS:

Q. 87. You say you don't know in whose favor the proxy was?

A. Yes, sir.

94 Q. 88. Well, you did know at one time?
A. No, sir.
Q. 89. Didn't you read enough of it to see what name was in it?
A. No, sir.
Q. 90. Well, how do you know it was a proxy?
A. Well, I glanced at it; I had a package of papers before me and I turned and looked at it—a mere casual glance at it.
Q. 91. Was it a printed or a written paper?
A. Written, my recollection is.
Q. 92. Do you know whose handwriting it is?
A. I think it is Mr. Legett's the secretary.
Q. 93. What officer of the company signed it; do you recollect?
A. No, sir; I did not notice the signature; I just saw it in connection with a latter from Mr. Ligett reporting that he had been to New York.
Q. 94. I don't care anything about that.
A. You asked me how I came to see it.
95 Q. 95. All I want to know is this: Your recollection of it is not definite enough to enable you to say anything more than that it was in the form of a proxy?
A. Yes, sir.
Q. 96. To vote on what number of shares, if you remember?
A. I did not read it word for word at all; you stopped me as I was going to explain. I haven't anything more to say.

The foregoing testimony having been read over to the witness, he states that he does not wish to add anything to the same and has no correction to make; thereupon it is stipulated that the stenographer's notes written out by himself and certified by the examiner shall be taken to be the original deposition without being signed by the witness.

JOHN P. GREEN, called as a witness on the part of the complainants, being duly sworn by the examiner, testified as follows:

By Mr. WILSON:

Q. 1. Where do you reside?
A. In Philadelphia.
Q. 2. What is your occupation?
96 A. I am one of the vice-presidents of the Pennsylvania Railroad Company.
Q. 3. Let me show you the certificates which have been put in evidence on the examination of Mr. W. H. Barnes, and ask you if those papers have at any time been in your custody.
A. Yes, sir.
Q. 4. When were they last in your custody?
A. About two months since—two or three months since; I cannot remember the exact time of that, but I think some few months since.
Q. 5. Some time in the year 1883?
A. Yes, sir; some time in the year 1883.
Q. 6. From whom had you received them?

A. I had received them from the officers of our western lines of the Pennsylvania Company.

Q. 7. From the Pennsylvania Company as distinct from the Pennsylvania Railroad Company?

A. Yes, sir.

Q. 8. What did you do with them finally?

A. We finally delivered them to Mrs. McComb's representative or counsel.

Q. 9. Do you know his name?

A. Mr. Bates, I believe.

97 Q. 10. Of Wilmington?

A. Yes, sir; a gentleman from Wilmington; I think it is Mr. Bates.

Q. 11. Are there other certificates of the same stock in your possession—still in your possession?

A. Still in my custody; yes, sir.

Q. 12. How many shares are still in your custody?

(Objected to by Mr. Bangs.)

The WITNESS: They are in the safe.

By Mr. BANGS:

Q. 13. Do you know the particulars?

A. Of these certificates?

Q. 14. Yes, sir.

A. Yes, sir; I have been over them a *a* number of times.

Q. 15. Dates and all that?

A. Oh, no, sir; I wouldn't remember that; I think I remember the number.

Mr. BANGS: Well, I will waive the objection.

By Mr. WILSON:

Q. 16. I presume this letter of yours will assist you (hands witness a letter).

98 A. My recollection is there are 733 shares—733 still standing in the name of Mr. Jordan and Mr. Tucker. I couldn't recall the second name at first, but that is the name. We had originally 5,000 shares, and they are all of the same general form as those (referring to certificates produced this day), but, of course, different names and for varying amounts, and we still hold about 733. You can easily make the number exact by deducting the number here from 5,000.

Q. 17. At the time these certificates here shown you were given back to Mr. Bates, as representative of the defendant, did you give back any other certificates or did you hand to Mr. Bates any other certificates?

A. At the time these were handed?

Q. 18. Yes, sir.

—. No, no—well, let me reflect—I see I have got the thing a little mixed. The shares of stock that we sold to Mr. McComb's repre-

sentative were the full 5,000 shares belonging to the Pennsylvania Company, of which these now produced did not form a part.

Q. 19. Can you give the numbers of those?

A. Well, only in case it is recalled to me; I can't remember.

Q. 20. Well, you can refresh your recollection.

99 Mr. BANGS: I object, as the inquiry is what certificates he has got in his possession.

The WITNESS: Well, this paper I am looking at is my own letter.

Mr. BANGS: Can you answer that?

The WITNESS: Yes, sir.

Mr. WILSON: I am asking now what he gave back to Mr. Bates.

Mr. BANGS: Then I object to his answer so far as it purports to tell anything about the consideration upon which he gave them back to Mr. Bates; the question is, What did he give back?

The WITNESS: I have not said anything about the consideration; at least I didn't intend to.

Mr. BANGS: I thought you wouldn't when I called your attention to it.

The WITNESS: Well, the block of 5,000 that belonged to the Pennsylvania Company were given to Mr. Bates.

Mr. BANGS: I object to that.

Q. 21. Can you state the numbers of the certificates of that 5,000 shares?

100 Mr. BANGS: I object to that on the ground that it does not yet appear that any particular 5,000 shares were sold to the Pennsylvania Company.

The WITNESS: They were numbered, the 5,000 shares owned by the Pennsylvania Company——

Mr. BANGS: I object to any further answer, that not being responsive to the question, the question being what did he give to Mr. Bates, and he being requested to answer by reference to the numbers of the certificates.

Q. 22. Well, go on with the answer.

A. Yes, sir; I understand the 5,000 shares that were held by the Pennsylvania Company, that were given to Mrs. McComb's representative, were numbered 267 to 271, being five certificates of one thousand shares each. There were other shares, amounting to 5,000 less 733, that had been held by the Pennsylvania Company in trust, and which, to the best of my recollection, were also delivered.

Q. 23. At the same time or at some other time?

A. That I cannot recall, whether it was the same time; probably it was about the same time, but I can't remember very distinctly.

Q. 24. And were those 733 shares you last mentioned the same as you already spoke of in the previous part of your exam-

101 ination?

A. Yes, sir; those are the ones that are still in my custody.

Cross-examination.

By Mr. BANGS:

Q. 25. How do you distinguish between 5,000 shares that you say were held in trust and 5,000 shares that were not held in trust?

A. Well, we owned 5,000 absolutely and 5,000 we did not own.

Q. 26. What ear-mark has either lot of 5,000 to distinguish it from the other $5,000?

A. Well, my recollection is (although, of course, it is only a recollection)—my recollection is that the 5,000 shares that the Pennsylvania Company owned stood in their name.

Q. 27. Stood where in their name?

A. The certificates were in their name—in the name of the Pennsylvania Company.

Q. 28. Well, see if you can find any such certificates there.

(Objected to by Mr. Wilson.)

102 The witness, after examining the certificates this day produced on the examination of Mr. Barnes, says:

A. No, sir; not among this batch.

Q. 29. Well, that is the batch Mr. Barnes has testified were in the possession of the Pennsylvania Company in the year 1871 and down from that time to 1883, when he left the service of the company?

A. Yes, sir; I have no doubt that is so.

Q. 30. Now, do you know of the Pennsylvania Company having had any other certificates than that batch and the 733 that you have spoken of?

A. Yes, sir; certainly; 5,000 others.

Q. 31. 5,000 others?

A. Yes, sir.

Q. 32. Besides these?

A. Yes, sir; they had 10,000 altogether; 5,000 they owned and 5,000 they held in trust.

Q. 33. Well, you have said that two or three times, and I objected to it, and I object again to your saying that they held 5,000 themselves and 5,000 in trust.

A. They had 10,000 shares altogether.

Q. 34. In their possession?

103 A. Yes, sir.

Q. 35. Under their control?

A. Yes, sir; in their possession.

Q. 36. And you think they had certificates for 5,000 in their own names?

A. Yes, sir.

Q. 37. And who put them in their own name?

A. That is a matter that I cannot answer.

Q. 38. Don't you know?

A. No, sir; I suppose it was done by the officers of the Southern Railroad Association. I do not suppose anybody else could do it.

Q. 39. Excuse me; I am not asking you what you supposed.

A. I did not mean to be testifying then.

Q. 40. If you will only answer my question. I asked you who did it.

A. What do you mean—who wrote in the name of the Pennsylvania Company?

Q. 41. Who put the stock in the name of the Pennsylvania Company?

A. Who wrote the name in or what?

104 Q. 42. No; it did not originally stand in the name of the Pennsylvania Company, did it?

A. That I don't know. I wouldn't know that.

Q. 43. Then, if it did not originally stand in their name and did afterwards, you don't know what person effected the transfer on the books of the Southern Railroad Association?

A. No, sir.

Q. 44. If there was any such transaction?

A. No, sir.

Q. 45. But you distinctly remember seeing a certificate containing the name of the Pennsylvania Company as the owner?

A. Yes, sir; I think I do, sir. I think there are five of them.

Q. 46. And handing those certificates over to Mrs. McComb?

A. To her representative. That is the best of my recollection.

Q. 47. Did you receive anything in return?

A. You mean as pay for them?

Q. 48. In any form.

105 A. Yes, sir.

Q. 49. What?

A. I received a check.

Q. 50. For how much?

A. $37,500; that is the best of my recollection.

Q. 51. Whose check?

A. Well, that I could not recollect.

Q. 52. And the Pennsylvania Company turned that check into money, did it?

A. I don't know, sir; I sent it to the Pennsylvania Company at Pittsburgh; their office is at Pittsburgh, you know.

Q. 53. Do you know anything about the transaction in the course of which the Pennsylvania Company got the possession of those certificates originally?

A. I can't say that I know anything more than from my general knowledge of the company's affairs.

Q. 54. You know it from what somebody has told you?

A. Yes, sir; that is what I mean.

Q. 55. I am not speaking of that kind of knowledge. Have you any such knowledge as is derived from personal participation in the transaction?

106 A. No, sir; not at that time.

Q. 56. Did the Pennsylvania Company or did you receive from anybody any notification or request in respect to the 733 shares for which you say it still retains certificates?

A. I don't remember any special request except perhaps a request from parties claiming to be counsel for the holders or owners of

those 733 shares not to turn them back to Mrs. McComb's estate; I think there was some request of that kind.

Q. 57. Whom do you mean?

A. I don't remember the names of the parties, but I have an impression that counsel representing the owners of those 733 shares sent a notice requesting that the Pennsylvania Company should not transfer them to Mrs. McComb's estate without further notice.

Q. 58. Was that a written request, a written notice?

A. No, sir; I think not, sir.

Q. 59. Was it given to you?

A. It was not a notice that was given to me, but some one,
107 my recollection is, came to the office in Boston or New York and told or advised me that there was perhaps some dispute as to the ownership of that stock, and requested, as far as I was concerned, that no delivery of the certificates should be made.

Q. 60. The request, whatever it was, was made to you personally?

A. Yes, sir; was made to me.

Q. 61. Was it made by Mr. Mansfield Storey?

(Objected to as not in the nature of cross-examination and as irrelevant.)

Q. 62. Wasn't it made by Mr. Mansfield Storey?

A. I think, perhaps, it was. I think he was counsel.

Q. 63. Well, he was the gentleman who communicated with you, wasn't he?

A. Yes, sir; my recollection isn't very clear, however.

Q. 64. Well, as far as it goes that is your recollection?

A. Yes, sir.

Q. 65. You have some recollection?

A. Oh, yes, sir.

Q. 66. That there was a personal interview?

A. Yes, sir.

108 Q. 67. In which the gentleman requested you not to give up those 733 shares to Mrs. McComb?

A. Yes, sir.

Q. 68. And that gentleman, according to your recollection, and you have a recollection, was Mr. Mansfield Storey, of Boston?

A. Yes, sir; to the best of my recollection.

Q. 69. Is it not also a part of your recollection that he claimed to represent and did represent Jordan, Marsh & Co. and the estate of Alanson Tucker?

(Objected to as immaterial.)

A. I think that it is very probably so, as the certificates stood in the name of Mr. Tucker and Mr. Jordan.

Q. 70. How many stood in the name of Mr. Jordan?

A. I can tell by looking at the certificates.

Q. 71. Was it not 600?

A. There were 600 in one name and 133 in the other. I can't remember how they were divided. I can't remember which of them had the 600 and which of them 133.

Q. 72. Were you requested by Mrs. McComb or her representative to transfer to her or to give to her those certificates of 733 shares?

109 A. Yes, sir; I had that request from Mr. McVeagh, her counsel.

Q. 73. Was that before or after you had received this notice not to deliver?

A. A long time before.

Q. 74. And you had declined to comply?

A. Yes, sir; I had declined to hand over any of those certificates unless I had some authority from the parties in whose name they stood.

Q. 75. As to those 733 shares, is it not the fact that ever since you have known anything about them they have stood in other names than the name of McComb or the executrix?

A. Yes, sir; with the power of attorney on the back.

Q. 76. Signed by the parties?

A. Yes, sir.

Q. 77. That is, the Jordan, Marsh & Co. certificates were accompanied by a power of attorney signed by Jordan, Marsh & Co.

A. I don't know who signed them, but they were like all these other certificates; there was what purported to be a power of attorney on the back of these certificates.

Q. 78. Well, didn't the power of attorney purport to

110 bear the signature of the person named in the certificate as the owner?

A. I presume so.

Q. 79. Will you allow me to ask you how long it would take you to get those certificates and bring them here with the power of attorney?

A. Well, the power of attorney is just like the power on these certificates.

Q. 80. How long would it take you to bring them here?

A. Well, twenty minutes to half an hour.

Q. 81. And could you within that time look and see if you have got a written notice relating to those 733 shares?

A. I can; but I am pretty sure that I have not; I would do so, however, with a great deal — pleasure.

Q. 82. Then, Mr. Green, I shall have to trouble you to bring those certificates here unless you consider yourself prevented by the notice.

A. I would not feel authorized to give the certificates up, of course.

Q. 83. That is not the object.

A. I have no authority to give them up.

111 (The witness here leaves the room and after half an hour or so returns and produces certificate No. 57, for 100 shares, in the name of E. D. Jordan, with transfer endorsed on the back, the same as the transfers already read in evidence, signed E. D. Jordan, without date; certificate No. 58, in all respects the same as

57; certificate No. 59, in all respects the same as 58; certificate No. 60, in all respects the same as 59; certificate No. 61, in all respects the same as 60; and certificate No. 62, in all respects the same as 61; also certificate No. 221, for 133 shares, in the name of Alanson Tucker, of Boston, dated the 30th of November, 1870, with the transfer on the back in the words of the former transfers, except that Alanson Tucker's name is in the assignment as the party making the transfer, and the transfer is signed Alanson Tucker without date, all of which facts are offered in evidence by the defendant.)

Mr. WILSON: Without having the certificates marked?

Mr. BANGS: Yes, sir; the certificates so described being offered in evidence without being marked.

Cross-examination (continued):

By Mr. BANGS:

Q. 84. Mr. Green, do you know of anything that has prevented those certificates of stock from getting back into the possession of Mrs. McComb, except the notice from Mr. Storey?

112

(Objected to by Mr. Wilson.)

A. That is the only thing that I know of.

Q. 85. That is the only obstacle?

A. That is the only thing I know of.

Q. 86. Has the Pennsylvania Company made any claim to the ownership of them?

A. No, sir.

Q. 87. Has it made any claim to the ownership of the remaining certificates that were shown to you this morning?

(Objected to by Mr. Wilson.)

A. You mean the other certificates of this 5,000 batch?

Q. 88. Yes, sir.

A. None to the ownership; no, sir.

Q. 89. Well, now, see if this is a correct statement of what you have meant to say on your examination. Up to within a year, say, the Pennsylvania Company had certificates in its own name for 5,000 shares of stock?

A. Yes, sir.

Q. 90. And it had other certificates all standing in the names of other parties, and there being a number of such parties?

113

A. Yes, sir.

Q. 91. For 5,000 shares more?

A. Yes, sir.

Q. 92. And you regarded those which stood in the name of the Pennsylvania Company as being its own property?

A. Certainly; no question about that.

Q. 93. Well, you so regarded them?

A. Yes, sir.

Q. 94. Which you regarded as held by the Pennsylvania Company in their own right?

A. My answer was there was no question about my regarding them so. I didn't mean that there was no question about their ownership.

Q. 95. And the remainder you regarded as held by the Pennsylvania Company upon some sort of trust?

A. Yes, sir.

Q. 96. Now, I want to know whether that distinction that you make in that way when you describe one batch as held by it in its own right as owner and another batch as held by it upon some trust—whether you make that distinction upon any other
114 foundation than the form of the certificates.

A. Oh, yes, sir.

Q. 97. Do you make that distinction upon any actual knowledge of the transaction by virtue of which the Pennsylvania Company came into possession of the certificates?

A. Upon my familiarity——

Q. 98. No; upon any actual knowledge?

A. Yes, sir.

Q. 99. At the time; in 1871?

A. Do you mean knowledge——

Q. 100. Of what occurred in 1871.

A. Yes, sir; I might say so.

Q. 101. Do you know——

A. I could go as far as that; yes, sir; upon certain knowledge I had at the time.

Q. 102. Whom did you see in relation to it?

A. I was present when Mr. McComb had his original conference with Mr. Scott and Mr. Thompson.

Q. 103. And those resulted in written agreements, did they not?

A. Those resulted in written agreements, and, if you will
115 allow me to say, my special province in the Pennsylvania railroad is to have charge of the Pennsylvania Company's lines, and therefore I would have more actual knowledge of facts connected with that than perhaps another officer would.

Q. 104. Then all that means that you did have some actual knowledge?

A. Yes, sir; in connection with my knowledge of papers, &c.

Q. 105. And there were conferences which resulted in written agreements?

A. Yes, sir.

Q. 106. And those are in the possession of the Pennsylvania Company?

A. Yes, sir.

Q. 107. And the plaintiffs' counsel in this case has recently seen them and knows all about them, doesn't he?

(Objected to.)

A. Well, that would be a little difficult for me to answer.

Q. 108. Isn't that so?

A. Is Mr. Bayard their counsel?

Q. 109. Yes, sir.

116 A. Yes, sir; I think Mr. Bayard has seen them; I think he has seen copies of them.

Q. 110. And have you furnished copies of them?

A. I got copies of a number of papers for Mr. Bayard.

Q. 111. Including the agreements?

A. Yes, sir, and furnished him copies and furnished copies to our people in Pittsburgh.

Q. 112. The 733 shares for which you have just produced certificates are shares which you include in the classification of those which the Pennsylvania Company held upon some trust?

A. Yes, sir; that is what I mean.

By Mr. WILSON:

Q. 113. Did you have personal knowledge of the sale by Mr. McComb to the Pennsylvania Company of 5,000 shares of those 10,000?

A. Only as far as the papers revealed that; I was not present at the consummation of it. I was familiar with the papers that were drawn at the time; that has been a good many years ago. Mr. Thomas A. Scott and Mr. J. Edgar Thompson were the parties who knew the particulars of the transaction the best; the parties

117 who had the actual negotiation of the transactions with Mr. McComb, and they are both dead.

Q. 114. But those actual negotiations resulted in written instruments?

A. Yes, sir.

Q. 115. Which you have mentioned and of which you furnished copies to the complainants' counsel?

A. Yes, sir; I think I gave them copies of them all.

Q. 116. How many papers were there—how many agreements?

A. Oh, that I cannot recall.

By Mr. BANGS:

Q. 117. The whole 10,000 shares were the subject of one transaction and of one set of papers, were they not?

A. Yes, sir.

Q. 118. There was not a separate transaction as to one lot of 5,000 and another transaction as to another lot, was there? They were all the subject of one bargain, weren't they?

A. Well, yes, sir; only as far as this, Mr. Bangs: that perhaps the original transaction may have contemplated at first only an actual purchase by the Pennsylvania Company of 5,000 shares, but ending in——

118 Mr. WILSON: "As consummated" the question is.

Mr. BANGS: No; the consummation will speak for itself.

The WITNESS (continuing): But that was so closely tied to the control of the other 5,000 shares that that practically formed one transaction; that is what I mean.

Q. 119. Do you know whose name the shares stood in that were transferred to the name of the Pennsylvania Company?

A. No, sir.

It is agreed that the foregoing may be written out by the stenographer, and as written out by him and certified by the examiner it shall constitute the deposition of the witness, without being signed by the witness.

Mr. Wilson produces papers which are marked respectively Exhibits 2, 3, and 4, S. R. S., ex'r, which it is agreed are correct copies of original papers on the files of the Pennsylvania Company, and it is agreed that they shall have the same force and effect as the originals would have if produced, and with that understanding Mr. Wilson offers them in evidence, and they are severally and respectively objected to as immaterial, incompetent, and irrelevant, and it is stated that until proof is offered to the contrary the
119 signatures of McComb on the originals are believed to be genuine.

The said three papers last offered in evidence are as follows:

EXHIBIT 2. S. R. S., EX.

Memorandum of Agreement Between H. S. McComb and the Pennsylvania Company.

Whereas, Henry S. McComb, of Wilmington, Delaware, has heretofore sold to the Pennsylvania Company fourteen thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand shares of the capital stock of the Southern Railroad Association, as set forth in a certain memorandum of agreement bearing date the eighth day of November, 1871,

Now this agreement witnesseth, that the said Henry S. McComb, in consideration of the sum of one dollar unto him in hand paid, the receipt whereof is hereby acknowledged, and of other good and valuable considerations, covenants and agrees, that at the end of two years from this date, he will, on sixty days' written notice from the Pennsylvania Company, a corporation created under the laws of the State of Pennsylvania, repurchase the said fourteen thousand shares of the capital stock of the New Orleans, Jackson and
120 Great Northern Railroad Company, and the five thousand shares of the capital stock of the Southern Railroad Association, at the price paid for the same by the said Pennsylvania Company, to wit, fifty dollars per share for the stock of the New Orleans, Jackson and Great Northern Railroad Company, and one hundred and twenty-five dollars per share for the capital stock of the Southern Railroad Association, and thirty per cent. advanced thereupon, less such dividends as may have been received in the meantime by the said Pennsylvania Company on said stock.

In witness whereof the said H. S. McComb, and the Pennsylvania

Company parties hereto, have hereunto set their hands and seals this eighth day of November A. D. 1871.

(Signed) H. S. McCOMB. [SEAL.]

For the Pennsylvania Company:

THOMAS A. SCOTT, *President.*

Signed, sealed and delivered in the presence of—
JNO. P. GREEN.

121 EXHIBIT 3. S. R. S., Ex.

Whereas, in accordance with certain understandings and agreements, fourteen thousand shares of one hundred dollars each of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand shares of one hundred dollars each of the capital stock of the Southern Railroad Association, have been transferred by Henry S. McComb, of Wilmington, in the State of Delaware, unto the Pennsylvania Company, a corporation created by and existing under the laws of the State of Pennsylvania;

And whereas, said shares of capital stock have been transferred to and received by the said The Pennsylvania Company upon certain trusts and conditions, the which it is intended by this writing to express and declare;

Now, therefore, the said The Pennsylvania Company does hereby acknowledge, testify and declare,

That the said fourteen thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand shares of the capital stock of the Southern Railroad Association, have been transferred to it by the said Henry S. McComb, upon the following trusts and conditions, and for no
122 other uses, trusts and conditions whatever, namely:

First. That all of said shares of capital stock in each of said companies, in connection with a like number of shares of each of said stock, owned by the Pennsylvania Company shall be used and employed by the said The Pennsylvania Company only for the purpose of enabling it so to manage and control each of said companies as may best conduce to the development and extension of their business upon said lines of railway, or any extensions or connections which may be found advantageous, in order that the same may be made to yield the best practicable results for the owners of the capital stock of said companies.

Second. Upon this further trust and confidence from time to time, as dividends of the profits of said companies accrue, to receive the same, and without delay pay over and divide the said dividends equally, one-half, to go to the said Henry S. McComb aforesaid, or the assigns of his interest in said capital stock or any part of the same.

Third. If said Henry S. McComb shall at any time so request the said The Pennsylvania Company shall execute such declara-

tions or other assurances of the interest of said Henry S. Mc-
123 Comb in the said capital stock or any portion of the same, as said party may request, so as to enable said party to avail himself of the equitable interest by him held therein, yet so as in no manner to impair the management and control of said capital stocks which was intended to be secured by the transfer to which this declaration relates.

In witness whereof, the said The Pennsylvania Company has hereunto affixed its corporate seal, duly attested, the eighth day of November, A. D. 1871.

For the Pennsylvania Company:

[SEAL.] (Signed) THOMAS A. SCOTT, *President.*

Attest: W. H. BARNES, *Secretary.*

EXHIBIT 4. S. R. S., Ex.

Memorandum of agreement, made the eighth day of November, A. D. 1871, by and between Henry S. McComb, of Wilmington, in the State of Delaware, of one part, and the Pennsylvania Company, a corporation created and existing under the laws of the State of Pennsylvania, of the other part.

124 Whereas, the said H. S. McComb has transferred to the said Pennsylvania Company fourteen thousand (14,000) shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand (5,000) shares of the capital stock of the Southern Railroad Association, upon certain trusts, and the said Pennsylvania Company has become the owner by absolute purchase from said H. S. McComb of a like number of shares respectively, making an aggregate of twenty-eight thousand (28,000) shares of the said New Orleans, Jackson and Great Northern Railroad, and ten thousand (10,000) shares of the Southern Railroad Association, all of one hundred dollars each, being a clear majority of stock of both said corporations.

And whereas, the said parties or either of them may, from time to time, desire to sell and dispose of portions of their interests in said capital stock of said companies.

Now this agreement witnesseth, that the parties for and in consideration of the sum of one dollar by each of them in hand to the other paid, the receipt whereof is hereby acknowledged, have mutually covenanted and agreed, and by these presents do mutually covenant and agree, each with the other,

125 That if either of said parties shall at any time hereafter desire to dispose of the whole or any portion of the shares of capital stock in the said respective companies by them held, he or they respectively shall, before offering the same to any other party, propose in writing to sell at any time within thirty days from the date of such proposition, the said shares of said capital stock to the other party, at the following rates and prices, namely: for shares of the capital stock of the New Orleans, Jackson and Great Northern

Railroad Company, fifty dollars per share, with interest thereon at ten per cent. per annum, from the date hereof, and for the shares of the Southern Railroad Association, one hundred and twenty-five dollars per share, with the like rate of interest.

Provided, however, that the amount of interest shall be abated by the amount of any dividends which may have been received by the party owning such shares, prior to the date of such sale, and at the expiration of thirty days if the other party shall fail to purchase at the prices above stated, then the party holding said shares shall be at liberty to dispose of the same, subject, however, to the conditions and trusts upon which they are held by the Pennsylvania Company, to such party, at such prices, and
126 on such terms as to the said party may seem proper.

It is also further agreed by and between the parties hereto that the authorized capital stock of the New Orleans, Jackson and Great Northern Railroad Company is eight millions of dollars, that the amount issued does not exceed four millions seven hundred and twenty-five thousand dollars, and that no further issue of the same, nor increase of capital stock shall be made without the consent of the parties hereto, and that the authorized capital stock of the Southern Railroad Association is two millions of dollars, all of which has been issued, and that the capital stock of said Southern Railroad Association shall not be increased without the like assent.

In witness whereof, the parties hereto have set their hands and seals the day and year aforesaid.

H. S. McCOMB.

For the Pennsylvania Company:

THOS. S. SCOTT, *President.*

Attest: W. H. BARNES, *Secretary.*

127 United States Circuit Court, District of Delaware, 3rd Circuit.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix, &c.,
against
ELIZABETH B. McCOMB, Executrix, &c.

NEW YORK, *May* 23, 1884.

At the office of Messrs. Marsh, Wilson & Wallace, No. 48 Wall street.

Present: Mr. Wm. G. Wilson, for complainants; Messrs. F. N. & F. S. Bangs, for defendant.

Jacob S. Rogers appears and, under subpœna, produces the stock-certificate book of the Southern Railroad Association, and also a book containing the minutes of the non-incorporated associ-
128 ation known as the Southern Railroad Association, and the minutes of the incorporated association known by that name.

Counsel for the complainants proposes to read in evidence from

the book last above mentioned the articles of association of the Southern Railroad Association, non-incorporated, contained on pages 38 to 49, inclusive; the act of the General Assembly of the State of Tennessee, passed Janary 14, 1889, incorporating the Southern Railroad Association, appearing on pages 74 to 80, inclusive, and also the deed of transfer from the non-incorporated association to the incorporated association, appearing on pages 83 to 88, inclusive; to which defendant's counsel objects as incompetent, but makes no objection to them as copies.

The following are copies of the said papers respectively:

Articles of Association.

Memorandum of agreement, made the thirtieth day of June one thousand eight hundred and sixty-eight, by and between Henry S. McComb, of Wilmington, in the State of Delaware, party of the first part; Josiah Bardwell of Boston, in the State of Massachusetts, party of the second part; Eben D. Jordan also of Boston, party of the third part; Henry Lewis, of Philadelphia, in the State of Pennsylvania, party of the fourth part; Cyrus H. McCormick, of the city of New York, party of the fifth part; H. Winthrop Gray, of the city of New York, aforesaid, party of the sixth part; John L. King, of Springfield, in the State of Massachusetts, party of the seventh part; Grenville M. Dodge, of Council Bluffs, Iowa, party of the eighth part; Charles A. Lambard, of Boston, aforesaid, party of the ninth part; Samuel M. Felton, of Delaware county, Pennsylvania, party of the tenth part; Horatio D. Newcomb, of Louisville, Kentucky, party of the eleventh part; Junius B. Alexander, of New York, aforesaid, party of the twelfth part; Samuel Tate, of Memphis, in the State of Tennessee, party of the thirteenth part; and Henry S. McComb, trustee, party of the fourteenth part.

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Whereas, the Mississippi Central Railroad Company, a body politic and corporate, existing under and by virtue of the laws of the States of Mississippi and Tennessee, in and by a certain indenture, bearing date the twenty-fifth day of June, one thousand eight hundred and sixty-eight, has granted, demised and to farm-let unto Henry S. McComb, the whole of the railroad of the said company for the term of sixteen years, in said indenture of lease specified; and has also granted to the said Henry S. McComb certain other rights, privileges and properties, in said indenture of lease specified; in and by which said indenture of lease, the said parties thereto have entered into divers covenants and agreements for the payment of money, and for other purposes, as by reference to the said indenture will more fully and at large appear; and

130

Whereas, the parties to this agreement are the individuals for whom, and in whose behalf the said lease was intended to be made by the said Henry S. McComb, and the said Henry S. McComb has executed the said indenture by the authority and on behalf of the said parties to this agreement; and

Whereas, it is intended by the parties hereto, at the earliest practical moment, to obtain from the legislature of the States of Mississippi and Tennessee, or from some other competent authority, the passage of an act incorporating the parties interested in said lease, and in the privileges and rights thereby granted and in the operation of the said road under the said lease; and in the meantime to take possession of the said property and rights granted by the said indenture, and use and operate the same.

Now this memorandum witnesseth, that the parties hereto,
131 for and in consideration of the premises, and of their mutual and respective covenants and agreements herein contained, have covenanted, promised and agreed, and do hereby covenant, promise and agree, to and with each other, in manner and form following, that is to say:

First.—For the purpose of temporarily operating the said railroad and managing and disposing of the said property, there is hereby formed an association, which shall consist of the parties hereto, and their respective successors in interest, and which shall be known by the name of "The Southern Railroad Association," which name shall be used, so far as practicable, in all the dealings of such association, and in which name all its contracts shall be made; but every action at law or equity, for the benefit of such association, may be brought so far as the law will permit, in the name of any member of such association, in whom, at the time of the commencement of such action, shall be vested the legal title to the demand or property sought to be recovered, secured, defended or protected in such action.

Second.—The legal title to said indenture of lease, and to any and all the rights, privileges and covenants in said indenture contained and to all sums of money and all property arising there-
132 from, and to all claims and demands accruing to said association, shall be and remain in the said Henry S. McComb and his assigns, to be held, nevertheless, in trust to and for the uses and purposes herein specified, and subject to the covenants herein contained; and the parties hereto and their respective successors in interest shall be equitably interested therein, as hereinafter provided.

Third.—For the purpose of carrying into effect the covenants in said indenture of lease contained upon the part of the party of the second part, thereto to be performed, and for the purpose of operating the road thereby leased, and acquiring and maintaining the property therein contracted for, there shall be raised at least a capital of fifteen hundred thousand dollars, to which the parties hereto shall and will contribute in the proportions following, that is to say: The said Henry S. McComb, the sum of four hundred and fifteen thousand dollars; the said Josiah Bardwell, the sum of one hundred thousand dollars; the said Eben D. Jordan, the sum of one hundred and seventy-five thousand dollars; the said Henry Lewis the sum of fifty thousand dollars; the said Cyrus H. McCormick, the sum of one hundred and twenty-five thousand
133 dollars; the said H. Winthrop Gray, the sum of one hun-

dred and twenty-five thousand dollars; the said John L. King, the sum of fifty thousand dollars; the said Grenville M. Dodge, the sum of twenty-five thousand dollars; the said Charles A. Lambard, the sum of one hundred and twenty-five thousand dollars; the said Samuel M. Felton, the sum of twenty-five thousand dollars; the said Horatio D. Newcomb, the sum of one hundred thousand dollars; the said Junius B. Alexander, the sum of seventy-five thousand dollars; and the said Henry S. McComb, trustee, the sum of sixty thousand dollars. And the parties hereto shall be interested in the said lease, and in the property, rights and privileges granted thereby, in proportion to their contributions to the said capital; and in case at any time during the continuance of this agreement the parties hereto, or their successors in interest, shall, by a vote of two-thirds in interest, agree that the said capital shall be increased to an amount not exceeding in all two millions of dollars, the parties hereto shall contribute or procure contributions for such increased capital in the proportion in which they have agreed to contribute to the said original capital.

Fourth.—The said capital shall be paid into the hands of
134 a treasurer, to be appointed by the parties hereto, at such times and in such installments as may be prescribed and called for by the board of committees hereinafter named and its successors, but shall be used and applied only to the purpose of carrying into effect the covenants of the said lease, and to operating and managing the said road and the property acquired under said lease and carrying out the proper objects of the said association.

Fifth.—The management and disposition of the property embraced in or affected by said lease, and the operating of the said railroad, and the procuring of an equipment therefor, and the receipt and disbursement of money, shall be under the control and direction of an executive committee, to consist of five persons, namely: Henry S. McComb, Eben D. Jordan, Charles A. Lambard, Samuel M. Felton and Junius B. Alexander.

Sixth.—Such committee and its successors shall possess, in reference to the said leased or granted property and in reference to said railroad, and the operating of the same, all the powers which are conferred upon boards of directors of railroad companies by the laws of the State of New York, or by the laws of the State of Mississippi, or by the laws of the State of Tennessee, or by all the
135 railroad laws of said States, or of either of them, so far as the parties hereto could collectively or severally use or exercise such powers. In case of a vacancy in said committee, created by the death or resignation, removal or expiration of term of office of any member of such committee, such vacancy shall be supplied by the members of the association, by a vote of a majority in interest, at any regular meeting of such members, or at any meeting duly called for that purpose *of* a majority in interest. Any member of said committee may be removed by a vote of two-thirds in interest of the members of said association at any regular meeting or at any meeting duly called for that purpose.

Seventh.—The equitable interests of the parties hereto and their

respective successors in interest in the aforesaid capital and property shall always be represented by certificates in the form of certificates of stock, which shall be prepared and signed by the proper officers of the association; and each contribution of one thousand dollars shall constitute one transferable share and interest in such capital property. Each such share and any number of such shares shall be transferable by the holder thereof upon the books, to be
136 kept as hereinafter provided; and upon a transfer of any such share or any number of such shares being made upon said books, the interest of the party making such transfer in the capital and property aforesaid, and his membership of such association shall cease to the extent of the shares so transferred; and the person or persons to whom such transfer shall be made shall become a member or members of the said association, pursuant to such transfer, and shall be entitled to the same rights, interests and privileges which the original holder of such share or shares possessed by virtue of his contribution and ownership thereof; but no such certificate nor any share represented thereby shall be transferred, except upon the payment by the holder of such share of all sums payable by him under this agreement, or in pursuance of anything done under this agreement, if such payments shall be required by the remaining associates or by said committee. In case of the loss of any certificates by the holder thereof, such holder shall, by making to said committee due and satisfactory proof of such loss, and upon furnishing to said committee satisfactory indemnity against any liabilities of such association on account of such lost certificates or the duplicates thereof, or on account of the
137 share or shares evidenced thereby, shall be entitled to a duplicate of such lost certificate.

Eighth.—All losses arising or occurring under said lease, or in carrying the same into effect, or in operating said road, or carrying out this agreement, shall be borne and shared by the parties equitably interested in said property in proportion to their respective interest therein, and no transfer of any interest therein shall exempt the person making such transfer from liability to contribute towards any indebtedness accrued or accruing at the time of such transfer. No interest in said capital or property, and no holding of any certificate representing the same, shall entitle the holder thereof to a dissolution of the association hereby formed, but such interest shall only entitle the owner thereof to an account from time to time of the said demised and granted property, and of the said capital, and of the proceeds and profits arising from said property and capital, and from the operating of said road under this agreement, and to share in the actual division of such profits at such time and times as it shall seem expedient to said committee and its successors to make a dividend of said profits, except that in case of the actual insolvency of the association hereby formed, and its inability
138 to pay its debts and to carry on said road, then any member thereof may dissolve the association hereby formed at his pleasure in the usual manner.

Ninth.—The said committee and its successors shall be, and they

are hereby, authorized to procure from the legislature of the States of Mississippi and Tennessee, or from any other competent authority, an act or acts incorporating all the subscribers hereto, and their successors being members of said association, under such name and with such powers and authority in reference to the said lease and the property acquired thereunder and in reference to the said railroad and the property of the said company, as said committee and its successors shall approve. And upon the passage of such act or acts of incorporation by any competent authority, the said committee and its successors shall have power, and the power irrevocable is hereby granted to them, to accept the same, and to bind the subscribers hereto, and their successors in interest, and the members of the association by their acceptance thereof, and to direct the transfer of the said lease, and of all the property acquired thereby, or by means and in pursuance of this agreement, to such corpora-
139 tion, and in fact so to transfer and deliver every legal and equitable interest as contributors to or owners of said capital and property of the subscribers hereto and their successors, and to accept in whole or in part payment for the property so transferred the certificates of stock and obligations of such corporation, and to distribute the proceeds of such transfer among the members of the association hereby formed, being holders of the certificates above provided for, in proportion to the respective interest of the subscribers hereto, and of their respective successors under this agreement; and the subscribers hereto and their respective successors shall accept the proceeds of such transfer in lieu of, and in full extinguishment, compensation and satisfaction for all other interest, rights, and claims upon the said leased and granted property, and any individual profits acquired for the use of the same, and any profits acquired in the operating of said road. But said committee may, before distributing said proceeds appropriate the necessary proportion and amount of the same to paying any indebtedness which may have arisen under said lease, or in the course of operating said road, or in carrying on the business of the said association, and may divide only the residue of such proceeds among the
140 members of the said association.

Tenth.—The said committee and its successors shall provide proper stock books, transfer books and certificate books, in which shall be entered the names of all members of said association, and of the number of shares held by each member thereof; and such books shall be at all reasonable times open to the inspection of the subscribers hereto and their successors in interest respectively.

Eleventh.—For the purpose of determining who are from time to time members of the said association, and of the extent of the respective interests of such members, severally, the said committee and its successors may from time to time, at regular and reasonable intervals, close the said books, and for a reasonable time prohibit the making of any entries or transfers therein, and suspend the right to create any new member of the association, or to transfer any interest therein; and no membership or right of membership shall be recognized or claimed on behalf of any person not duly

registered on said books as a member of said association, or not holding such certificate, as is above prescribed.

141 Twelfth.—No transfer of any interest under this agreement or under said lease, of any certificate representing the same, shall be made, except in pursuance of, and in conformity with, this instrument; and no certificate shall confer any right or title, unless such certificate shall, on its face, refer to this instrument as controlling the rights of the holder of such certificate, and no membership shall cease or be transferred, except upon the actual surrender of a certificate therefor; but said committee and its successors shall at all times, and so far as may be otherwise consistent with the terms of this instrument, impose no unreasonable restrictions upon changes of membership.

Thirteenth.—Regular meetings of the members of said association shall be held at such place and time as provided in the by-laws of the association; and at such meetings, vacancies in said committee then existing shall be filled by ballo*t;* and at each such meeting the members of the said committee shall prepare and make public to the association, a detailed exhibit of the financial condition of the association; a majority of said committee may also from time to time convene meetings of the recognized members of said
142 association, at such convenient time and place as said committee may designate, by written or printed notices, to be deposited in the mail, prepaid and addressed to such recognized members, at their usual places of business respectively, at least ten days before the day named in such notices as the day for meeting; and at such special meeting, or at any regular meeting, any vacancy in said committee may be filled as aforesaid, and said capital may be increased as aforesaid.

Fourteenth.—At any meeting of the said association any member thereof may be represented and may vote by proxy.

Fifteenth.—The funds of the said association may be used and invested in the purchase of the stock, bonds and other obligations of the said The Mississippi Central Railroad Company, mentioned in said lease, to be used and disposed of for the benefit of the said association. No member of the said association shall hereafter purchase any of said stock, bonds or other indebtedness, except for the benefit and in trust for the said association; and any of such stocks, bonds or other indebtedness now held by any subscriber hereto, shall be held in trust, to transfer the same to the said association, or to the person holding the legal title to the property of the
143 said association, for the benefit of such association, upon the request of the said committee, and upon the cost of the same, with interest on such cost at the rate of seven per cent. per annum on such cost.

In witness whereof, the parties hereto have severally signed these

articles of association, and do subscribe the sums set opposite our names respectively:

HENRY S. McCOMB, $415,000.
H. S. McCOMB, *Trustee*, 60,000.
JOSIAH BARDWELL, 100,000.
EBEN D. JORDAN, 175,000.
H. W. GRAY, 125,000.
H. D. NEWCOMB, 100,000.
J. B. ALEXANDER, 75,000.
CHAS. A. LAMBARD, 125,000.
JOHN L. KING, 50,000.
C. H. McCORMICK, 125,000.
SAM. TATE, 50,000.
S. M. FELTON, 25,000.
HENRY LEWIS, 50,000.

Witness, as to all these signatures:

SAM'L H. EDGAR.

An Act to Incorporate the Southern Railroad Association.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted as follows, that is to say: The following persons, namely, Henry S. McComb, Sam. Tate,
144 Josiah Bardwell, Eben D. Jordan, Charles B. Lambard, H. Winthrop Gray, Cyrus H. McCormick, Junius B. Alexander, John L. King, Horatio D. Newcomb, Samuel M. Felton, and Henry Lewis, their successors, assigns and associates, shall be and they are hereby created and constituted a body politic and corporate in law under the name of the Southern Railroad Association, and as such they shall have succession, with the right to sue and be sued, to have a common seal, and enjoy such other immunities and privileges as necessarily belong to corporations by the laws of the State. Provided, That nothing in this act shall be so construed as to confer banking privilege on the company herein mentioned.

2d. The said corporation is hereby vested with power and authority to take a lease or leases of the Mississippi Central railroad from the company which is now the owner thereof, together with the franchises of said company, and the rolling stock in use upon the railroad, and all the appurtenances of said railroad, upon such terms and conditions as may be agreed upon between the said Southern Railroad Association and the Mississippi Central Railroad Company.

145 3d. The said Southern Railroad Association shall have power to be substituted as lessee in place of any party or parties who may have heretofore become lessees of said Mississippi Central railroad, upon such terms and conditions as shall have been agreed to by the said Mississippi Central Railroad Company, the Southern Railroad Association, and the original lessees.

4th. The said Southern Railroad Association shall be bound to execute, perform and carry out in good faith all the covenants and

agreements made or to be made by and between the said association and the said Mississippi Central Railroad Company, so far as they are or shall be consistent with the law of this State, and the rights of other parties; and on the failure of such performance the said Mississippi Railroad Company shall be entitled to its just remedy by action at law or bill in equity, as the case may require.

5th. The said Southern Railroad Association shall have and may exercise all the functions, powers and authorities, rights, liberties, privileges and franchises of the Mississippi Central Railroad Company, to the extent and for the time agreed upon in the contract of lease made or to be made by and between the said two companies, agreeably to the true intent and meaning of such con-
146 tracts, and the said Southern Railroad Association shall have a right to manage, run, use, occupy, and repair said railroad, with all its stock and appurtenances, taking and receiving the tolls and profits thereof, as fully as said Mississippi Central Railroad Company might or could do under the present charter; provided, however, that nothing therein contained shall authorize the said Southern Railroad Association to exercise any privilege or assume any power not granted to the said Mississippi Central Railroad Company by the existing laws of this State; and provided, also, that if the said Southern Railroad Association shall willfully and persistently violate the obligations imposed upon the Mississippi Central Railroad Company by its charter, to the injury of the public or the said last-named company, such misconduct shall be regarded as an abuse of this law, and, upon proper judicial proceedings being had before any court of competent jurisdiction, the rights, and privileges conferred by this act may be declared to be forfeited, and shall thenceforth cease and determine.

6th. The franchises of the Mississippi Central Railroad Company shall not be forfeited or impaired by reason of their exercise
147 being suspended during the term for which said railroad shall be leased to the Southern Railroad Association, but at the expiration of said lease the said Mississippi Central Railroad Company may resume the exercise of the said franchises as fully as if no lease had been made.

7th. The Southern Railroad Association shall have power to take a lease of any railroad or railroad route, finished or unfinished, which the law of this State has authorized to be made, and which connects, mediately or immediately with the line of the Mississippi Central railroad, and may exercise the franchises of the said company now authorized to make or manage such road, upon terms to be agreed upon, with same restrictions and liabilities as are hereinbefore provided for in case of lease, to wit, from the Mississippi Central Railroad Company; and if the said Southern Railroad Association shall build or extend any railroad in pursuance of a contract which contains a stipulation that it shall keep possession of the railroad so built or extended until the cost thereof be reimbursed, such contract shall be carried out in good faith by the parties thereto, and the right of the said Southern Railroad Associa-

148 tion to retain the road and exercise the franchises of the lessor, or until reimbursement is made, shall not be questioned.

8th. The direction and management of the company hereby incorporated shall be entrusted to twelve directors, who shall cho-se from among themselves one person to be president, another to be vice-president, and another to be treasurer of said company; and said directors are hereby authorized to create such offices in said company as they may deem necessary, and to provide how the same shall be filled. The directors shall be annually chosen, on the first Wednesday of September, by the stockholders. The stockholders may vote by proxy or in person, each stockholder having one vote for every share of stock held by him. The meetings for election of directors, shall be held at such place as the president of the company shall designate. Any holder of ten shares of the stock or upwards shall be eligible as a director. The places of business for the president, vice-president, treasurer, directors and other officers of the company shall be designated in the by-laws; and the directors are hereby authorized to make by-laws for the government of said company.

9th. The capital stock of said company shall be two mil-
149 lions of dollars, to be divided into shares of one hundred dollars each, and the same shall be transferable in person or by attorney on the books of the company.

10th. The first election of directors shall take place on the first Wednesday in September, 1869, and in the meantime the affairs of the company shall be managed by the twelve stockholders having the largest number of shares, who shall have all the power and authority of directors chosen by the stockholders; any three of the persons named in the first section of this act may be commissioners to take subscriptions until the first of January, 1869, after which time stock books shall be kept and subscriptions taken by the treasurer agreeably to such by-laws as the directors may make on that subject.

11th. When stock to the amount of one million two hundred thousand dollars shall have been subscribed to this company and paid in, and notice thereof shall be given to the governor, the said company shall be considered as organized, as having accepted the provisions of this act, and bound to perform on its part all the details thereby imposed upon it.

12th. Be it further enacted, That the State of Tennessee by
150 granting this charter does not in any way relinquish, surrender or waive any lien she now has on the said Mississippi. Central railroad, its fixtures, franchises, rolling stock or anything else belonging to the said Mississippi Central Railroad Company upon which the State now has a lien, or on any other company that they may lease under the provisions of this act, and also retain the same against the company newly chartered.

13th. Be it further enacted, That the said company shall be liable to pay such taxes as the legislature may from time to time seem proper to impose upon this and similar companies, not exceeding

the taxes imposed on the property and privileges in this State; and that this act shall take effect from and after its passage.

I, Andrew J. Fletcher, secretary of the State of Tennessee, do certify that the foregoing is a copy of an act of the General Assembly of the State of Tennessee, the original of which is now on file in my office.

In testimony whereof, I have hereunto subscribed my official signature and by the order of the governor affixed the great seal of the State of Tennessee at the department, in the city of Nashville, this 14th day of January, A. D. 1869.

A. D. FLETCHER,
[SEAL.] *Secretary of State.*

151 This indenture, made the twenty-second day of January, eighteen hundred and sixty-nine, by and between the association, formed by a written agreement between Henry S. McComb and others, bearing date the thirtieth day of June, eighteen hundred and sixty-eight by the name of the Southern Railroad Association, acting in its behalf by the said Henry S. McComb, its vice-president, and Samuel H. Edgar, its secretary, and Eben D. Jordan, Samuel M. Felton, Junius B. Alexander, and Charles A. Lambard, its executive committee, hereto duly authorized, parties of the first part; and Henry S. McComb, Josiah Bardwell, Charles A. Lambard, Sam. Tate, Eben D. Jordan, Junius B. Alexander, Cyrus H. McCormick, H. Winthrop Gray, John L. King, H. D. Newcomb, Henry Lewis and Samuel M. Felton, parties of the second part, and the Southern Railroad Association, a body politic and corporate duly created and existing under and by virtue of an act of the legislature of the State of Tennessee, passed the fourteenth day of January, eighteen hundred and sixty-nine, entitled "An act to incorporate the Southern Railroad Association," party of the third part; witnesseth:

152 That the said parties of the first and second parts, for and in consideration of the sum of twelve hundred thousand dollars, to them in hand paid by the said party of the third part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain and sell, assign, transfer and set over unto the said party of the third part, its successors and assigns, all and singular the property and estate, assets and effects, rights, privileges and franchises, stock, machinery, tools, cars, bills, bonds, notes, causes of action and of rights of action and other assets, and effects of the said parties of the first and second parts as an association as aforesaid or as members of said association, and particularly all the rights, title, interest, estate, claim, and demand at law and in equity of the said parties of the first and second parts of, in, to and upon the lands, premises, and other property mentioned and described in or demised or conveyed by a certain indenture made the 25th day of June, eighteen hundred and sixty-eight by and between the Mississippi Central Railroad Company, party of the first part, and Henry S. McComb, and others, parties of the second part thereto, or mentioned or described in

a certain other indenture bearing date the 25th day of June, eighteen hundred and sixty-eight, made by and between the said Missis-
153 sippi Central Railroad Company, party of the first part thereto, and the said Henry S. McComb and others, parties of the second part thereto, or mentioned and described in or granted by any other indenture or deed made by the said Mississippi Central Railroad Company to or in favor of either of the parties of the first and second parts hereto, together with the said indenture and every clause, article and condition therein contained, and the rights, privileges and franchises purporting to be thereby granted. To have and to hold the above granted and assigned premises to the party of the third part, its successors and assigns as fully and effectually to all intents and purposes as the said parties of the first and second parts or any or all of them had held or enjoyed or were entitled to have, hold or enjoy the same up to the time of the making of this indenture, or as fully and effectually to all intents and purposes as the said parties of the first and second parts could or would have had, held or enjoyed the same if this indenture had not been executed. Subject, nevertheless, to the covenants and conditions in the several indentures contained, the performance of which covenants is hereby assumed by the said party of the third part,
154 and the said party of the third part doth hereby covenant, promise and agree to and with the said parties of the first and second parts, and each and every of them that the said party of the third part shall and will and it does hereby absolutely assume all the covenants, agreements and obligations of the said parties of the first and second parts, under the said indentures or either of them, and all the deeds, contracts, obligations and liabilities assumed or incurred by the said parties of the first and second parts or any or either of them under the said indentures, or either thereof, or in the course of carrying on the business mentioned in the said articles of association. And the said parties of the first and second parts for themselves and their successors in interest do hereby covenant, promise and agree to and with said party of the third part that in case there now is or shall hereafter appear to be no lawful authority on the part of the said party of the third part under the laws of the State of Mississippi to operate the railroad and property mentioned in said indenture within the State of Mississippi, or to exercise any corporate rights or franchises in the State of Mississippi, then until such authority shall be lawfully acquired within the State of Mississippi, they, the said parties of the first and second parts, and their respective
155 successors in interest, shall and will hold so much of the said property hereinbefore granted and conveyed or intended so to be as shall be subject to the laws of Mississippi in their own names, but subject to the use, direction and control, and in trust for the benefit of the said party of the third part and its authorized agents, and at the risk and responsibility of the said party of the third part, its successors and assigns, the said party of the third part, its successors and assigns, holding the said parties of the first and second parts, harmless and fully indemnified in respect

thereto; and whensoever the said party of the third — shall acquire and possess (if it has not already acquired and does not now possess within the State of Mississippi) the right to hold, use, exercise and enjoy within the State of Mississippi the property, rights, privileges and franchises intended to be hereby conveyed, then the said parties of the first and second parts, and their respective successors in interest, shall and will execute all such further deeds, conveyances, and other instruments as shall be reasonably required in order to vest in the said party of the third part, its successors or assigns, all and singular the property and estate, assets and effects, rights, privileges and franchises hereinabove mentioned and
156 described subject as aforesaid.

In witness whereof, the said association called the Southern Railroad Association, has hereunto set its seal and has caused these presents to be attested by its vice-president and secretary and executive committee aforesaid, and the parties of the second part have hereunto set their hands and seals, and the said party of the third part has set its corporate seal and caused these presents to be attested by its treasurer the day and year first above written.

The Southern Railroad Association, being the association formed June 30, 1868, under articles of agreement dated that day

H. S. McCOMB, *Vice-President.*
SAMUEL H. EDGAR, *Secretary.*
H. S. McCOMB,
E. B. JORDON,
S. M. FELTON,
J. B. ALEXANDER,
CHAS. A. LAMBARD,
Executive Committee.
E. B. JORDAN,
JOHN L. KING,
H. S. McCOMB,
H. W. GRAY,
S. M. FELTON,
J. B. ALEXANDER,
H. D. NEWCOMB,
By J. B. ALEXANDER,
Att'y-in-Fact.
JOSIAH BARDWELL.
HENRY LEWIS.
CHAS. A. LAMBARD.
C. H. McCORMICK.
H. S. McCOMB, *Trustee.*

The corporation called the Southern Railroad Association, incorporated January 14th, 1869:

JOHN L. KING, *Treasurer.*

157 Mr. Wilson offers in evidence the certificate book this day produced by Mr. Rogers and the stubs of certificates Nos. 157 to 164, inclusive, dated October 6, 1870, for 100 shares each, pur-

porting to have been issued to H. S. McComb, trustee, said book containing one certificate on each page, with a wide margin on the left of the page, and commonly called a "stub," the cancelled certificates having been repasted in the places from which they were originally taken, the date of the first stub being October 6, 1870, and the date of the first certificate appearing to have been cut out of the book or issued out of it is also October 6, 1870, and all the succeeding stubs and certificates up to and including 164 bear the same date.

Mr. Wilson also offers in evidence nine drafts, dated November 7, 1871, signed by Thomas A. Scott, president Pennsylvania Company, drawn upon and accepted by J. Edgar Thompson, president Pennsylvania Railroad Company, all to the order of H. S. McComb, of which the following are copies:

158 "$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

Thirty days after date pay to the order of H. S. McComb one hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 2.

Across the face are written the words: "Accepted. J. Edgar Thomson, pres't."
(Endorsed:) "H. S. McComb."

"$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

Sixty days after date pay to the order of H. S. McComb one hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 3.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."
(Endorsed:) "H. S. McComb."

159 "$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

Ninety days after date pay to the order of H. S. McComb one hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 4.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "H. S. McComb."

"$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

Four months after date pay to the order of H. S. McComb one hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 5.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "H. S. McComb."

160 "$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

Five months after date pay to the order of H. S. McComb one hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 6.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "H. McComb."

"$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

Six months after date pay to the order of H. S. McComb one hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penn. R. R. Co., Philada."
No. 7.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "H. S. McComb. For collection for account of the National Park bank, N. Y. Pay to the order of John Castner, cashier. Wm. K. Kitchen, pres't; John Castner, cash."

161 "$200,000. PHILADELPHIA, *Novem. 7th*, 1871.

Four months after date pay to the order of H. S. McComb two hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 8.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "H. S. McComb. For collection for account of the National Park Bank of N. Y. Pay to the order of First National bank, Philadelphia, Pa. G. Philler, V. P."

"$225,000. PHILADELPHIA, *Novem. 7th*, 1871.

Six months after date pay to the order of H. S. McComb two hundred and twenty-five thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To J. Edgar Thomson, Esq., pres't Penna. R. R. Co., Philada."
No. 9.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "Pay Drexel & Co. or order for collection. Drexel, Morgan & Co., pp. Drexel & Co.; C. H. Godfrey; H. S. McComb."

162 "$200,000. PHILADELPHIA, *Novem. 7th*, 1871.

Eight months after date pay to the order of H. S. McComb two hundred thousand dollars, value received, and charge to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Company.

To J. Edgar Thomson, pres't Penna. R. R. Co., Philada."
No. 10.

Across the face is written: "Accepted. J. Edgar Thomson, pres't."

(Endorsed:) "H. S. McComb. Pay Drexel & Co. or order for collection. Drexel, Morgan & Co., pp. Drexel & Co.; C. H. Godfrey."

Mr. Wilson also offers in evidence draft dated November 7th, 1871, drawn by Thos. A. Scott, president Pennsylvania Company, upon William Shaw, vice-president Pennsylvania Company, in favor of H. S. McComb, of which the following is a copy:

"$100,000. PHILADELPHIA, *Novem. 7th*, 1871.

At sight pay to the order of H. S. McComb one hundred
163 thousand dollars, value received, and charge the same to account of Pennsylvania Company.

THOMAS A. SCOTT,
President Penna. Co.

To Wm. Shaw, Esq., vice-president Penna. Co., Pittsburg, Pa."
No. 1.

Across the face is written, "Approved. J. Edgar Thomson, pres't," and stamped, "Pennsylvania Company. Cashier. November 10, 1871."

(Endorsed:) "H. S. McComb. For deposit to credit of H. H. Houston, E. M. Pay to the order of J. Scott, Jr., cashier, for credit of Philadelphia National bank. R. F. Chatham, C. John Scott, Jr., cash."

GEORGE A. FRINK, called as a witness on the part of the complainants, being duly sworn by a notary public, testified as follows:

Direct examination by Mr. WILSON:

Q. 1. Where do you reside, Mr. Frink?

A. # 307 Madison avenue, New York.

164 Q. 2. You are one of the complainants in this cause?

A. Yes, sir.

Q. 3. Your co-complainant, Mrs. Snyder, is also a resident and citizen of this State, is she not?

A. Yes, sir.

Q. 4. When did you first acquire any knowledge of the facts alleged in the complaint in this cause with reference to any conversion or other use of the stock in the Southern Railroad Association which you claim to have belonged to Mr. C. Brown Snyder in his lifetime?

(Objected to as immaterial.)

A. Well, the first knowledge I had of it was some time after Mr. Snyder's death.

Q. 5. How did you obtain such knowledge as you then obtained?

A. The knowledge I obtained I obtained from you.

Q. 6. You had better state the name.

A. From Mr. Wilson.

Q. 7. Had you made or caused to be made any inquiries in reference to that stock up to that time?

A. No, sir.

165 Q. 8. Why had you not done so?

A. Well, I had no knowledge of any value to be attached to the stock at that time.

Q. 9. Had you any reason, so far as you knew, for making any inquiry or investigation into the matter whatsoever?

(Objected to as incompetent and immaterial.)

A. No, sir.

Q. 10. Until such information as you obtained was imparted to you by Mr. Wilson had anything occurred since the death of Mr. Snyder to call your attention to that stock in any manner?

(Objected to as immaterial and incompetent.)

A. No, sir.

Cross-examination by Mr. BANGS:

Q. 11. Did you know Mr. Snyder in his lifetime?

A. Yes, sir.

Q. 12. Were you connected with him in business?

A. I was; yes, sir.

Q. 13. Did you know of a lawsuit he had with Mr. McComb in Boston in 1878?

166 A. Well, I knew of it in a general way. I had no direct knowledge of it at all.

Q. 14. You knew there was a lawsuit?

A. I knew there had been a lawsuit.

Q. 15. How did you know that?

A. From general conversation with Mr. Snyder.

Q. 16. He told you there had been a lawsuit?

A. Mr. Snyder spoke of it.

Q. 17. Did Snyder tell you that he had sued McComb?

A. Well, Mr. Bangs, I cannot answer except in a general way.

Q 18. Well, you can answer that, whether he told you that he had sued McComb.

A. Well, Snyder mentioned having sued McComb—having had a lawsuit with McComb in Boston; it was in the way of a general conversation in the family.

Q. 19. Well, is that what you call answering in a general way? If it is, I will adapt the questions to that method of answering. The question I put is, Did Mr. Snyder tell you that he had sued Mr. McComb?

A. Well, if you ask me if Mr. Snyder told me directly, I cannot answer that he did.

167 Q. 20. Well, did he tell you indirectly?

A. Yes, sir; that is what I am trying to answer.

Q. 21. What do you mean by saying that he told you indirectly?

A. I mean that Mr. Snyder talked in a general conversation in the family in regard to this suit.

Q. 22. You mean he was talking about other things at the same time?

A. No, sir; he was talking about that; he was talking—my information was derived in that way—he was talking about that suit.

Q. 23. And something else at the same time?

A. Possibly.

Q. 24. I know possibly; but what is your recollection?

A. My recollection of it is simply as I stated, that Mr. Snyder, in

a general way, told me of a suit that he had against McComb in Boston.

Q. 25. What do you mean by a "general" as distinguished from a "particular" way?

A. Well, I should define it in this way: that this suit had taken place and Mr. Snyder spoke of it, and, as I understood it then, the suit was all over and all finished.

168 Q. 26. And did he tell you that he had been defeated in the suit?

A. Yes, sir; he did.

Q. 27. Did he tell you what the suit was for? Yes or no, please.

A. Yes, sir.

Q. 28. Were you related to him, and how?

A. I was his son-in-law; married his daughter.

Q. 29. Did he tell you that he had brought suit against Mr. McComb for about $45,000 or $46,000 of money which he claimed had been handed by him to Mr. McComb to invest in the purchase of Southern Railroad Association stock or in a subscription to that stock; isn't that what he told you?

A. No, sir.

Q. 30. What did he tell you?

A. I cannot state what Mr. Snyder told me except as I told you, in a general way, that he had a case against Mr. McComb.

Q. 31. Didn't he tell you it was about Southern railroad stock?

A. He told me it was something in connection with South-

169 ern railroad stock.

Q. 32. Didn't he tell you that he had sued McComb for some stock or the value of some stock held by McComb as trustee?

A. I cannot answer that, sir, that he did.

Q. 33. Didn't he (Snyder) tell you that he had an interest in some stock held by McComb as trustee?

A. I don't know that he did, sir.

Q. 34. When did you have with him the conversation that you did have?

A. It occurred at Mr. Snyder's house at various time-. I cannot fix any dates. It was family conversation.

Q. 35. Well, you knew and believed, didn't you, before his death that he had some interest in Southern Railroad Association stock?

(Objected to as immaterial.)

Q. 36. You knew and believed that, didn't you?

A. I knew that Mr. Snyder had had a suit against Mr. McComb and that the point of the suit was something in relation to Southern Railroad Association stock.

Q. 37. Didn't you know or believe before Mr. Snyder died

170 that he had or claimed an interest in some stock of the Southern Railroad Association?

(Same objection.)

A. I don't know how I can answer you, Mr. Bangs. I certainly cannot answer you directly.

Q. 38. Well, answer indirectly, then.

A. The only answer I can give is as I answered you before, that Mr. Snyder stated in a general way that he had had a suit against Mr. McComb in Boston.

Q. 39. I am not asking what Mr. Snyder stated; I am asking without reference to what Mr. Snyder stated. Didn't you know or believe that he at the time of his death had an interest in stock of the Southern Railroad Association?

A. I knew that Mr. Snyder had had an interest in a suit against Mr. McComb, but at the time of Mr. Snyder's death I did not know so.

Q. 40. Didn't you know that he had an interest in the stock?

A. No; because I supposed the suit had all been finished up and closed up; that the suit in Boston had closed the thing up.

Q. 41. Did you ever read the bill of complaint in this cause?

171 A. Yes, sir; I did.

Q. 42. Did you swear to it?

A. I did, sir.

Q. 43. Upon what basis did you state in that bill of complaint that Mr. Snyder paid all sums that were required to be paid by the Southern Railroad Association upon or by reason of the subscription mentioned in the bill of complaint?

A. Will you repeat that again, please?

Q. 44. Upon what basis did you state in that bill of complaint that Mr. Snyder paid all sums that were required to be paid by the Southern Railroad Association, upon or by reason of the subscription mentioned in the bill of complaint above, above seventy per cent.?

A. Well, that came from the record of the case.

Q. 45. What record?

A. The record of the case in Boston.

Q. 46. Well, here is the record of the case in Boston (handing witness record referred to); what place in the record did that come from?

(Objected to.)

172 Q. 47. Well, is the book now produced and shown to you the book which you referred to as the record in the case?

A. Yes, sir.

(Book marked "A for indent." this day; which book is left in the possession of Mr. Wilson.)

Q. 48. Now, will you please point out what place in that book furnished you any basis for declaring that Snyder had paid anything above seventy per cent. on the subscription referred to in the bill of complaint in this cause?

(Objected to by Mr. Wilson on the ground that the record and the contents of the record cannot be introduced in evidence in that way, and further that the record is not evidence in the present action.)

The WITNESS: This seems to be embodied, Mr. Bangs, in the whole of Mr. Snyder's examination here.

Mr. BANGS: I object to the answer.

Q. 49. The question *os*, will you please point out anything in that record that states that Mr. Snyder paid more than seventy per cent. on the subscription referred to in the bill of complaint in this cause?

(Objected to by Mr. Wilson on the same grounds, and also immaterial, until some call upon Mr. Snyder is shown for a further payment beyond seventy per cent.)

173 Mr. Bangs here puts in evidence the minutes of the meeting of the Southern Railroad Association (as contained in the minute book this day produced by Mr. Rogers, beginning at page 74) of January 21, 1869, omitting therefrom the act of incorporation and the deed of transfer, which have already been put in by Mr. Wilson, of which minutes so put in evidence by Mr. Bangs the following is a copy:

Corporation Meeting.

NEW YORK, *January 21st*, 1869.

At a meeting of the following persons, held at room No. 22, number 20 Nassau street, in the city of New York, on the 21st day of January, 1869, there were present Henry S. McComb, of Wilmington, Delaware; Josiah Bardwell and Eben B. Jordan, of Boston; Henry Lewis, of Philadelphia; Cyrus H. McCormick, H. Winthrop Gray, Junius B. Alexander, and Charles A. Lambard, of New York; John L. King, of Springfield, Mass.; Samuel M. Felton, of Delaware county, Pennsylvania; Horatio D. Newcomb, of Louisville, Kentucky, by his attorney, J. B. Alexander; Henry C. Crane, of
174 Yonkers, N. Y.; Lawrence C. Trimble, of Kentucky; Francis N. Bangs, of New York, and Samuel H. Edgar, of Wilmington, Delaware.

On motion, Henry S. McComb was appointed chairman; Samuel H. Edgar, secretary, and John L. King, treasurer.

The chairman produced and read to the meeting a certified copy of the act passed by the legislature of the State of Tennessee January 14, 1869, entitled "An act to incorporate the Southern Railroad Association."

(Here follows act.)

The chairman also read the following resolution of the former Southern Railroad Association:

"Resolved, That the counsel to this association be instructed to prepare a proper transfer to said corporation of all the property of this association, and that the vice-president, secretary, and executive committee of the association be authorized to execute the same in the name of the association and deliver the same to the corporation, and also to deliver to said corporation the sum of one million two hundred thousand dollars in cash or its equivalent."

On motion, the treasurer was directed to prepare a sub
175 scription paper to the entire capital stock of said corporation
to the end that the said act might be accepted and the organ-
ization perfected under the same.

The treasurer having prepared such subscription paper, the same was signed by all the parties present (excepting Mr. Bangs and Mr. Edgar) and was also signed by Henry C. Crane, as attorney for Horatio Thomas C. Durant, and by J. B. Alexander, as attorney for Sam. Tate. D. Newcomb, and by Henry S. McComb, as attorney for Sam. Tate.

Upon inspection of said subscription paper it was ascertained that two million dollars ($2,000,000) had been subscribed in all and that the following twelve persons were the largest subscribers, namely: Henry S. McComb, Eben D. Jordan, Horatio D. Newcomb, H. Winthrop Gray, Charles A. Lambard, C. H. McCormick, Josiah Bardwell, Junius B. Alexander, John L. King, Sam. Tate, Henry Lewis, and Samuel M. Felton.

Whereupon, all said persons being present, it was voted that by virtue of said act the said twelve largest stockholders do now assume the office of directors and managers of said company.

On motion, it was—

176 Resolved, That this corporation in its corporate name do accept the said act of incorporation and do purchase the property of the former organization, acting under articles of association dated June 30, 1868, known as the Southern Railroad Association, embracing its leasehold property, real estate, money, bonds, bills, rights of action and things in action, franchises, rolling stock, machinery, and assets, of whatever name and description, at the sum of twelve hundred thousand dollars ($1,200,000) in cash or its equivalent; that immediate payment of sixty per cent. of the sums already subscribed to the capital stock of this company be required and that out of the sums paid upon such subscription the treasurer do consummate the purchase hereinabove directed to be made.

That the secretary and treasurer notify the governor of the State of Tennessee that the corporation has been duly organized under the charter and capital paid in to the extent of one million two hundred thousand dollars ($1,200,000).

Resolved, That until the permanent appointment of a treasurer be made John L. King be, and he is hereby, appointed treasurer during the pleasure of the board and authorized to collect
177 such subscriptions and to consummate such purchase herein-
above directed.

Resolved, That John L. King, Henry Lewis, and Samuel M. Felton be, and they are hereby, appointed a committee to prepare by-laws.

Resolved, That this corporation assume all the debts, contracts, obligations, and liabilities of the said former association and the members thereof in respect to said property above directed to be purchased, and the following form of deed is hereby approved:

(Here follows the deed already incorporated in these minutes, beginning at page 95.)

Resolved, That the former seal of said association be, and the same

is hereby, adopted as the seal of this corporation, with the addition of the words "Incorporated January 14, 1869," and that the secretary be directed to make an impression from the said seal upon the page of the minute book containing the record of this day's proceedings.

On motion, adjourned to January 22, 1869.

Attest: SAMUEL H. EDGAR,
[SEAL.] *Secretary, Chairman.*

Q. 50. Now, Mr. Frink, are you ready?

178 A. What is the question?

Q. 51. Question repeated.

A. I point here to Mr. Snyder's evidence on the record here on page 48.

Q. 52. On page 48 of that record?

A. Yes, sir.

Q. 53. This is it, is it (indicating)?

A. Yes, sir.

Mr. Bangs here reads the indicated portion as follows:

"Q. Did you ever pay more than $45,000? A. I did, sir; but indirectly. Q. How did you pay it? A. It was paid out of money in the hands of F. Skinner & Co. of mine—paid to the then treasurer of the corporation. Q. How much? A. Well, it seems to me it was $4,000 or $5,000. It may be $6,000. I don't know. John King was treasurer, I think, at the time. Q. You don't answer the question I put you. It was not more than $6,000? A. I am sure I can't tell you now. Q. Don't you know how much of your money was appropriated? A. I don't remember every little transaction of a thousand dollars. Q. No; this is not a thousand-dollar transaction that I am asking about. It is a $60,000 transaction?

179 A. We are talking now about the smaller transaction. Q. You say that $45,000 of your money had been appropriated on a subscription of $60,000? A. I paid—— Q. Just answer my question. A. I didn't say I paid $45,000. Q. I don't say you did. Do you mean to say your understanding was that at the outset $45,000 of your money was appropriated on that subscription for $60,000? A. No, sir; I say that whatever came from the proceeds of the speculation in Rock Island was appropriated towards the six hundred shares. Q. You never knew how much that was, did you? I knew about how much it was. Q. Well, about how much was it? A. The proceeds of the draft for $45,000 and the interest; that was to be settled. Q. Do you mean to say that your present understanding is that the proceeds of the drafts for $45,000 altogether had been appropriated to that subscription of $60,000? Is that what you mean to have understood? A. I mean to have understood that what was to be returned to me from the speculation in the Rock Island Railroad Company was to be applied to the subscription for six hundred shares of the Southern Railroad Association. Q. Can't you give us an idea what that amount was? A. I can't. Well, it was about $45,000."

180 Mr. BANGS: Then below it says:

"—. Now, in addition to whatever was appropriated out of that Rock Island money how much money of your own was ever appropriated, as far as you know, to that $60,000 subscription? A. I have already stated to you that there was $5,000 or $6,000 that was paid by F. Skinner & Co. Q. Is $6,000 the highest sum you will name? A. There might be more than $6,000 and might not. Q. It did not exceed $6,000, did it? A. Well, probably not. Q. Then the total amount of your money which you claim to have invested in that subscription does not exceed, probably, the sum of $51,000, does it? A. Probably not. Q. Did you ever see in anybody's hands any vouchers for calls or instalments on subscriptions? A. I saw notes that had been given by Mr. Bardwell to John L. King, treasurer of the corporation, one of which I know he had paid."

Q. 54. Now, do you know of any other basis besides that?

(Objected to by Mr. Wilson on the ground that it is improper in the guise of a question to import into the case evidence which
181 is irrelevant and immaterial, and also that the question is immaterial.)

Q. 55. Now, will you answer?

A. I don't think I have any other guide, sir, than what I got from the record of the case.

Q. 56. I ask you if you have any knowledge except that derived from the reading what I have just read to you.

A. No, sir; I don't think I have.

Q 57. When did you first see this record?

A. Well, some time after Mr. Snyder's death.

Q. 58. Did you never see it during his lifetime?

A. I think not, sir; I am not quite sure.

Q. 59. Did he tell you that he had testified in that suit in Boston?

A. Well, I don't know that he told me so; I knew that he had testified.

Q. 60. How did you know it?

A. From general talk about the case.

Q. 61. Weren't you there?

A. No, sir; I was not. At that time I was scarcely acquainted with Mr. Snyder.

Q. 62. You married into his family afterwards?

A. I married into his family in 1860.

182 Q. 63. Have you read the papers incorporated in this record purporting to be exhibits given on that trial?

A. I have read that record in a general way; I don't know that I have read it attentively.

Q. 64. Well, haven't you got some of the papers that were read in evidence on that trial?

A. Well, I think Mr. Wilson has those papers.

Mr. BANGS: Have you any of them, Mr. Wilson?

Mr. WILSON: Yes, sir.

Mr. BANGS: Won't you let me have any that you have?

Mr. WILSON: Do you want them now?

Mr. BANGS: Yes, sir; I mean the exhibits that were used on that trial.

Q. 65. Now, I will ask you, that Mr. Wilson has come back and I can't take advantage of you, who told you that this was the record of that trial in Boston. Who told you so; Mr. Wilson, didn't he?

A. I think so?

Q. 66. Well, you haven't any doubt of it, have you?

A. No; I can't say that I have any doubt of it; I think my attention was first called to it by him.

183 Q. 67. And that was while he was acting as attorney for you, was it?

A. Yes, sir.

Q. 68. Mr. Wilson was your attorney?

A. Yes, sir—that is, as administrator.

Q. 69. And you knew that he had been Mr. Snyder's attorney during his lifetime?

A. Yes, sir; I knew that Mr. Snyder had business with him.

(Mr. Bangs is here handed some papers by Mr. Wilson.)

Q. 70. I show you now three drafts, each dated April 22, 1869, and each signed J. Bardwell and addressed to Strang & Snyder, New York, each for fifteen thousand dollars, the first one payable thirty days after date to the order of McComb and endorsed by him; the next payable forty days after date to the order of McComb and endorsed by him, and the next payable fifty days after date to the order of McComb and endorsed by him, and ask you if you found those notes among Mr. Snyder's papers.

A. Yes, sir; I did.

Mr. Bangs offers in evidence the said three drafts, of which the following is a copy:

184 "$15,000. BOSTON, *April* 22, 1869.

Thirty days after date pay to the order of H. S. McComb fifteen thousand dollars, value received, and charge the same to account of—

J. BARDWELL.

To Messrs. Strang & Snyder, New York, 37 Broadway.

{ Two dollars and fifty cents U. S. int. rev. stamp, cancelled, and five-dollar U. S. int. rev. stamp, cancelled." }

"$15,000. BOSTON, *April* 22, 1869.

Forty days after date pay to the order of H. S. McComb fifteen thousand dollars, value received, and charge the same to account of—

J. BARDWELL.

To Messrs. Strang & Snyder, New York, 37 Broadway.

[Five dollars U. S. int. rev. stamp, cancelled.]"

"$15,000. BOSTON, *April* 22, 1869.

Fifty days after date pay to the order of H. S. McComb fifteen thousand dollars, value received, and charge the same to account of—

J. BARDWELL.

To Messrs. Strang & Snyder, New York, 37 Broadway.

[Two dollars and fifty cents U. S. int. rev. stamp, cancelled.]"

185 Each of the above three drafts bears the following endorsement:

"H. S. McComb (erased). H. S. McComb. Pay Bank of New York, National Banking Association, for collection account of Bank North America, Philadelphia. John H. Watt, cash."

Q. 71. Now, I show you a paper, which, by incorporating it in the question, I offer in evidence as follows. It is signed by H. S. McComb, in McComb's handwriting:

"Received, Boston, April 22, 1869, of J. Bardwell his three drafts of $15,000 each, 30, 40, and 50 days' date, on Strang & Snyder, New York, being in payment for one-fourth interest in 10,000-share transaction in the stock of the Chicago and Rock Island Railroad Co., to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co., of New York, as brokers, for the account of myself and Bardwell.

H. S. McCOMB."

Did you find that among Mr. Snyder's papers?

A. Yes, sir.

Q. 72. Is it in his handwriting except the signature; and, if not, in whose is it?

186 A. I don't know the handwriting of the body of that instrument, Mr. Bangs.

Q. 73. On the next sheet of the same paper, which contains the receipt last read, is this:

"The three drafts mentioned in the foregoing receipt were paid by Strang & Snyder and by them charged to my account on their books after the transaction in Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but $42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt, as trustee, dated Nov. 23, 1869.

C. B. SNYDER.

Boston, January 23, 1870."

Which paper I offer in evidence (if you verify it) by incorporating it in this question: Did you find that paper among Mr. Snyder's papers?

A. Yes, sir.

Q. 74. In whose handwriting is it above the signature, if you know?

A. I don't know positively, Mr. Bangs. I can only state in whose handwriting I think it is.

187 Q. 75. Well, that is all anybody can swear to.

A. I think it is in the handwriting of Mr. Coe.

Q. 76. Mr. Snyder's book-keeper?

A. Yes, sir; his book-keeper at that time, afterwards his partner.

Q. 77. Did you find the paper now shown you among Mr. Snyder's papers?

A. Yes, sir; I recognize this as one of the papers I found.

Mr. BANGS: I offer it in evidence; it is as follows:

"*Memo. in Bardwell's Handwriting, Rec'd Nov.* 23, 1869.

To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. had been paid. The notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

H. S. McCOMB, *Trustee.*"

Q. 78. Did you find among Mr. Snyder's papers the document which I now show you?

188 A. Yes, sir.

Mr. BANGS: I offer it in evidence, as follows:

"OFFICE OF H. S. McCOMB,
WILMINGTON, DEL., *Nov.* 22, 1869.

Josiah Bardwell, Esq., care of F. Skinner & Co., Boston.

DEAR SIR: I send this (acknowledgment as trustee) the first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes, in any manner, please return it to me with such instructions to be carried out as you shall see disposed to make.

Yours truly, H. S. McCOMB, *M.*"

Q. 79. Did you find among Mr. Snyder's papers that which I now show you?

A. Yes, sir.

Mr. BANGS: I offer it in evidence, as follows:

"OFFICE OF H. S. McCOMB,
WILMINGTON, DEL., *June 15th*, 1874.

C. B. Snyder, Esq., care Mr. Josiah Bardwell, Boston.

DEAR SIR: I have your letter, with Mr. Bardwell's and
189 the memo. given by me to you, through Mr. Bardwell; but I do not know how I can help you.

I will do anything I can consistently, with the obligations that are already on me, and hope to be able, at the meeting on Monday next, in New York, to suggest something that will relieve you and not hurt me. You can depend upon my doing everything I can reasonably be expected to do in the matter.

Yours truly, H. S. McCOMB."

Q. 80. Did you find the memorandum referred to in that letter?

A. I cannot tell without looking over the papers.

Mr. BANGS: Have you anything of that sort, Mr. Wilson?

Mr. WILSON: I never saw it.

Mr. BANGS: I will ask you, Mr. Frink, to look among Mr. Snyder's papers and see if you can find any memoranda relating to the subject.

The WITNESS: Yes, sir.

Q. 81. Did you find among Mr. Snyder's papers that which I now show you signed by him, dated July 30th, 1874?

A. Yes, sir.

Mr. BANGS: I offer it in evidence as follows:

190 "BOSTON, *July* 30, 1874.

Be it known that I, C. B. Snyder, for value received, do hereby transfer and assign to Leland, Allen & Bates, all my right, title and interest to the receipt or acknowledgement of H. S. McComb, trustee (see copy annexed) and do by this transfer and convey to them all the rights and privileges belonging to me in the ownership of said receipt.

C. B. SNYDER.

Witness:
O. B. COE."

"SUFFOLK, *ss:*

JULY 30, 1874.

Personally appeared C. B. Snyder and acknowledged the above to be his free act and deed.

Before me—

O. B. COE,
Justice of the Peace."

Copy of Receipt or Acknowledgement.

"Memo. in Bardwell's handwriting, rec'd Nov. 23d, 1869.

To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an agreement with Josiah Bardwell, an original subscription of sixty thousand dollars, on
191 which seventy per cent. has been paid.

This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

H. S. McCOMB, *Trustee.*"

Mr. BANGS: Now, I wish you would let me read in that connection Exhibit L.

Mr. WILSON: I don't object to your reading it from the book.

Q. 82. Look at that paper, which is printed in that record as Exhibit L, and say if you found any copy or original of that paper among Mr. Snyder's papers—I mean any other copy than that obtained in the record.

A. No, sir.

Mr. BANGS: And without objection from Mr. Wilson I offer that Exhibit L as a part of the correspondence.

Mr. WILSON: Treating the copy as if it were the original?

Mr. BANGS: Yes, sir; thereupon I offer, by Mr. Wilson's consent, this copy of Exhibit L from the record in evidence with the same force and effect as if the original were produced.

Mr. WILSON: But I object to it as immaterial. I object
192 that the original letter itself is immaterial, but do not object to the use of a copy.

The following is a copy of Exhibit L above referred to:

"BOSTON, *Aug.* 18, 1874.

Col. H. S. McComb,

DEAR SIR: We have recently made financial transactions with Mr. C. B. Snyder, and among the securities received from him, we have your acknowledgment as trustee that you hold an original subscription for acc't of C. B. Snyder, trustee, for sixty thousand dollars in the Southern Railroad Association, upon which seventy per cent. (according to the wording of the acknowledgment, say $42,000) has been paid.

It is our wish that the bonds alluded to in the ack. be transferred and delivered to us, and your receipt given up.

It is however proper to say that when Mr. Snyder assigned this acknowledgment to us he remarked that possibly you might prefer (in order to benefit a third party) to return the money (42,000 dollars and interest at eight % per annum) instead of turning over the bonds, and desired us to give you that option.

193 Will you be so kind as to inform us by return mail of your wishes in the matter.

We understand that Mr. Snyder informed you some days ago of the assignment to us.

Yours resp., LELAND, ALLEN & BATES."

Q. 83. Did you find among Mr. Snyder's papers the paper now shown you, signed Leland, Allen & Bates?

A. Yes, sir.

Mr. BANGS: I offer it in evidence as follows:

"BOSTON, *April* 3, 1875.

Be it known that we, Leland, Allen & Bates, for value received, do hereby transfer and assign to C. B. Snyder all our right, title

and interest to the receipt or acknowledgment of H. S. McComb, trustee (see copy annexed), and do by this transfer and convey to him all the rights and privileges belonging to us in the ownership of said receipt.

LELAND, ALLEN & BATES.

Witness:
O. B. COE."

APRIL 3, 1875.

SUFFOLK, *ss:*

194 Personally appeared C. H. Allen and acknowledged the above to be the free act and deed of the firm of Leland, Allen & Bates.

Before me—

O. B. COE,
Justice of the Peace.

"*Copy of Receipt of Acknowledgment.*

Memo. in Bardwell's handwriting, rec'd Nov. 23rd, 1869.

To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an agreement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid.

This notice is in conformity with an agreement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

H. S. McCOMB, *Trustee.*"

Q. 84. Now, Mr. Wilson hands me and I show you three letters from McComb to Leland, Allen & Bates, one dated July 21, 1874, one dated August 31, 1874, and one dated September 21, 1874, and ask if you found those among Mr. Snyder's papers.

195 A. Yes, sir; I recognize these all, sir, as having been found among Mr. Snyder's paper-.

Mr. BANGS: I offer those letters in evidence.

Mr. WILSON: I object to them as immaterial and incompetent.

The following are copies of said letters:

H.

"OFFICE OF H. S. MCCOMB,
WILMINGTON, DEL., *July* 21, 1874.

C. B. Snyder, Esq., care Messrs. Leland, Allen & Bates, Boston.

DEAR SIR: I have your favor of the 16th.

I would have fixed what I agreed with Mr. Bardwell, to do in your case, had he met me here preparatory to my going South, as he promised and as I expected he would do.

I can send you the $30,000 Southern R. R. Ass'n paper, and will do it if you will return me the paper I signed, giving you so much

of the benefits of the stock which was in my name as trustee for Mr. Bardwell, and which I held, by agreement from him, as collateral for advances made to him and F. Skinner & Co. which
196 advances more than cover all this stock.

Notwithstanding this, however, I agreed with Mr. Bardwell to give him this paper to help you out; am willing now, as I always have been, to do whatever I can to help him out of his dilemmas.

I do not think that I ought to have been asked to do this much; but, still, I agreed to do it, and am ready to do it, though it will somewhat inconvenience me, because I have so many things to pay for our concerns, which keeps me beggarly poor all the time. But for my poverty I would have done more for Bardwell's sake.

Yours truly, H. S. McCOMB."

"There is no man living whose prosperity and well being I so much desire as I do that of Josiah Bardwell, of Beverly and Boston, though of all this you need say nothing to him about.

H. S. McC."

M.

"OFFICE OF H. S. McCOMB,
WILMINGTON, DEL., *Aug.* 31, 1874.

197 Messrs. Leland, Allen & Bates, Boston, Mass.

DEAR SIRS: Your letter of the 18th received in my absence. Mr. Snyder's interest in the stock standing in my name in the Southern Railroad Association, as trustee, is only a contingent interest. This stock was held by me as security for advances made to a third party, before I heard of Mr. Snyder in connection therewith; and it is, therefore, dependent upon the satisfaction of the prior lien thereon.

Neither Mr. Snyder nor any other person either paid or authorized me to pay, any calls for allotments of bonds sold to shareholders under and by virtue of the authority of the shareholders in a duly called meeting, at which both Mr. Snyder and Mr. Bardwell were present. There are, therefore, no bonds connected with or belonging to this stock.

Having now no money to invest, I am not at present a purchaser of this or any other stock, which I regret.

Yours truly, H. S. McCOMB.

Sent to New York for signature and overlooked.

W. T. W."

198 O.

"OFFICE OF H. S. McCOMB,
WILMINGTON, DEL., *Sept.* 21, 1874.

Mesrs. Leland, Allen & Bates, Boston.

DEAR SIRS: I have no reply to make to your letter other than that already made.

You are at liberty to take any steps that your judgment may dictate in the matter.

Yours truly, H. S. McCOMB."

Q. 85. Mr. Frink, did you find among Mr. Snyder's papers any other documents beside those that have been shown you this afternoon relating to the matters in controversy in this cause?

A. The papers and documents that I found among Mr. Snyder's papers relating to this suit I handed to Mr Wilson, and what he has any further than that I don't know; I don't know whether I have any further papers at home or not; I will look and see.

Mr. WILSON: You had better look.

199 Mr. BANGS: Mr. Wilson, now, if you have any papers relating to this thing I would like to see them.

Mr. WILSON: I can't tell you now.

Mr. BANGS: Well, I would like to have you look, if you will.

Mr. WILSON: Yes, sir.

Mr. BANGS: Now, Mr. Frink, it is my wish that you not only look at home for any other papers, but that you will examine the papers which you have left with Mr. Wilson, and, unless you can swear that the papers which you examine do not relate to this business, I should like to have yourself considered as notified to produce them. If you can conscientiously swear that any paper that you find has no relation to this business and relates to other subjects I have no right to call for it, but except when you can so swear I should be glad to have you produce at the next hearing the other papers in Mr. Snyder's possession.

The WITNESS: Relating to this case?

Mr. BANGS: Yes, sir; or which seem to relate to this controversy; particularly if they shed any light upon the question of how

200 much Mr. Snyder paid on the subscription for either 600 shares or the subscription for 800 shares.

Mr. WILSON: Mr. Wilson desires to have it noted simply, without insisting on any other form of notice than the present, that he does not admit the right of the counsel for the defendant to make such a general and indefinite call for any and all papers.

Mr. BANGS: Well, in addition to the above call I ask Mr. Frink to produce on the adjourned day all such papers as he found in Mr. Snyder's hands at the time of his death as he conscientiously believes or has reason to believe relate to the transaction in controversy, and would notify the plaintiffs' counsel to do the same thing, to produce all the papers received by him from Mr. Frink in connection with this controversy or of the parties carrying it on, and particularly all papers received by him from Mr. Frink or in his possession otherwise which have any relation to the merits of this controversy.

Complainants' counsel makes the like response as before.

Adjourned to Friday, May 30, 1884, 2 p. m.

201 FRINK *ag'st* MCCOMB.

NEW YORK, *June* 6, 1884.

At the office of Mr. Wilson, 48 Wall street, New York city.

Present: Mr. Wilson, for complainant; Mr. F. N. Bangs, for defendant.

GEORGE A. FRINK recalled for further examination.

By Mr. BANGS:

Q. Mr. Frink, are you able to produce any other papers which seem to have any relation to the matter in controversy here?

A. I found nothing—no document relating to this matter.

Mr. WILSON: I would like to say, in answer to the call made at the last meeting, that I find one additional paper which I hand to Mr. Bangs; that is the only paper which I have found bearing on the matters in controversy here.

202 (Said paper marked A for identification, this date.)

Mr. WILSON: I will say that I have quite a number of memoranda which may be the originals or may be copies of various memoranda which are printed as exhibits in the record of the Massachusetts case, but aside from that I find nothing else.

(It is stipulated that the copies of all exhibits which are printed in and annexed to the record of the trial of the case in Massachusetts, and which record has been marked "B for identification," may be treated as and deemed to have the like effect and admissibility as the originals of such exhibits.)

Adjourned until next Friday, June 13, 1884.

GEO. A. FRINK.

NEW YORK, *June* 13, 1884.

At No. 48 Wall street, New York city.

Parties met pursuant to adjournment.

Mr. Wilson offers in evidence the following exhibits from the printed record which has been marked "A for ident. May 28, '84," which, by consent, are received with the like effect as if the originals were produced:

203 EXHIBIT E, LETTER OF SNYDER TO MCCOMB, DATED JUNE 3, 1874.

The following is a copy of said Exhibit E:

(Confidential.)

BOSTON, *June* 3, 1874.

H. S. McComb, Esq.

MY DEAR SIR: At the request of our friend Mr. Bardwell, I send you the enclosed. This gives me the opportunity to tell you in

confidence the state of the case. I have unexpectedly been called on to pay $40,000, a debt of F. Skinner & Co. and myself, which I supposed was paid long since. Not owing anything, my means are all invested in a way that I cannot reach them at present. I can get along with $30,000. What I want is for you to let me have in some way the above amount ($30,000), so that I can use it at once, and then you can reimburse yourself from the sale of consolidated bonds when they are issued. If you can do this you will render a great favor to Mr. B. and myself, and I will be under obligations to you. Please let me hear from you.

Yours truly, C. B. SNYDER.

204 EXHIBIT G, LETTER OF SNYDER TO MCCOMB, DATED JULY 16, 1874.

The following is a copy of said Exhibit G:

BOSTON, *July* 16, 1874.

Col. H. S. McComb.

MY DEAR SIR: Mr. Bardwell stated to me, on his return from N. Y. June 30, that he had made arrangements with you to give me the notes of the S. R. R. Association on account of my stock held by you in trust, and also that the notes would come as soon as you had time to have them made, at 4 months' time. I have waited patiently, and Mr. Bardwell has promised me the notes almost every day. I trust you will do me this favor, because I am really in a tight place and am borrowing the money from day to day, from my friends. I would not ask you for the favor if I could possibly get along without it. Will you help me? Please let me know when you will be in N. Y. or where I can see you next week.

Yours truly, C. B. SNYDER.

205 EXHIBIT I, LETTER OF SNYDER TO MCCOMB, DATED JULY 28, 1874.

The following is a copy of said Exhibit I:

BOSTON, *July* 28, 1874.

Col. H. S. McComb.

DEAR SIR: Yours of the 21st came duly to hand, and I have communicated the contents to Mr. Bardwell. F. Skinner & Co. never had any interest in the money you receipted to me for as trustee, neither had Mr. Bardwell, except that I agreed to share the profits of the transaction with him after receiving the principal and interest at 8 per cent. per annum, and it was as much to help him as myself that I asked you for an advance. I cannot entertain your offer for a moment, but I will assign my interest to parties who will take what they are entitled to, no more—no less.

Yours respectfully, C. B. SNYDER.

EXHIBIT N, LETTER OF LELAND, ALLEN & BATES TO MCCOMB, DATED SEPTEMBER 19, 1874.

206 The following is a copy of said Exhibit N:

BOSTON, *Sept.* 19, 1874.

Col. H. S. McComb.

SIR: Your letter of Aug. 31st, came to hand four or five days ago. We examined the receipt you gave as trustee before it was transferred to us, and both before and since that time have infestigated the circumstances and conditions of the trust, and fell entirely certain that no third party has any claim or interest in the property. We have only to renew the request made in our letter of Aug. 18th, and add that on the 1st of October we shall, unless previously settled, place the matter in the hands of our legal adviser.

Yours, truly, LELAND, ALLEN & BATES.

EXHIBIT P, LETTER OF LELAND, ALLEN & BATES TO MCCOMB, DATED NOVEMBER 9, 1874.

The following is a copy of said Exhibit P:

BOSTON, *Nov.* 9, 1874.

Col. H. S. McComb.

DEAR SIR: We should be very glad to have trusteeship
207 in the So. R. R'd Assoc., concerning which we have heretofore corresponded, arranged.

Several times within 4 or 5 weeks Mr. Bardwell has said that you was ready to be relieved of the trust by transferring the stock represented by your receipt.

If you will notify us by mail or teleg., stating when you will next be in N. Y'k, we might meet you there for the purpose indicated.

Yours truly, LELAND, ALLEN & BATES.

EXHIBIT Q, LETTER OF MCCOMB TO LELAND, ALLEN & BATES, DATED NOVEMBER 11, 1874.

The following is a copy of said Exhibit Q:

The New Orleans, St. Louis & Chicago Railroad Co., president's office.

WILMINGTON, *Nov.* 11, 1874.

Messrs. Leland, Allen & Bates, 51 Avon St., Boston.

GENTLEMEN: I have your favor of 9th inst., and note contents.

I will give due consideration to your suggestion and will
208 arrange appointment for you to meet me in New York in reference to the subject of your letter.

Yours truly, H. S. McCOMB, *Prest.*

EXHIBIT W, LETTER OF BARDWELL TO MCCOMB, DATED NOVEMBER 12, 1869.

The following is a copy of said Exhibit W:

MY DEAR MCCOMB: Will you please acknowledge that you hold in "the Southern Ass'n," as trustee, for (the benefit), or rather for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest.

Yours truly, J. BARDWELL.

Boston, Nov. 12th, 1869.

EXHIBIT 21, LETTER OF CUTTER TO MCCOMB, DATED OCTOBER 25, 1873.

The following is a copy of said Exhibit 21:

209 BOSTON, *October* 25, 1873.

H. S. McComb, Esq.

DEAR SIR: Yours of the 21st, was duly rec'd. Happy to have served you, and you will command me when I can be of use to you. Mr. Bardwell is quite well, and although financial matters are rather mixed here, he appears to keep up his usual good spirits. Are the interests of F. S. & C. in the Southern R. R'd Association, on which you advanced 60 M. dollars, still intact, and are they worth the loan and principal? How does the 60 M. of Mr. Snyder's stand affected?

Yours truly, EDMUND F. CUTTER.

EXHIBIT 22, LETTER OF MCCOMB TO CUTTER, DATED OCTOBER 27, 1873, AND CUTTER'S MEMORANDUM ON SAME.

The following is a copy of said Exhibit 22:

Southern Railroad Association.

Lessees of the Mississippi Central Railroad Company. Office of the president.

WILMINGTON, DEL., *October* 27, 1873.

E. F. Cutter, Esq., Boston, Mass.

210 DEAR SIR: The South'n R. R. Association stands all right, & everybody's interest stands upright & square.

Yours truly, H. S. MCCOMB, *Pres.*

This is answer to my letter of Oct. 25th, 1873. See F. S. & Co.'s letter book.

E. F. C.

Each of the foregoing exhibits was objected to in due season by defendant's counsel as immaterial, irrelevant, and incompetent.

UNITED STATES OF AMERICA,
Southern District of New York.

I, William E. Zabriskie, a notary public in and for the city and county of New York, certify that the reason for taking the foregoing depositions is and the fact is that the said Francis C. Cross and said George A. Frink are material and necessary witnesses in the cause in the captions of said depositions named; that said Francis
211 C. Cross lives at Chicago, Illinois, and said George A. Frink lives in New York city aforesaid, both of which places are at a greater distance than one hundred miles from the place of trial of the cause for and in which said depositions are taken.

I further certify reasonable notice of the taking of said depositions was given, which notice and the acceptance of service thereof is hereto prefixed.

I further certify that on the days in the foregoing record specified I was attended at my office, No. 48 Wall street, in the city of New York, by the counsel for the respective parties to said cause and by the said witnesses; that each of said witnesses, being of sound mind and lawful age, was by me first duly examined, cautioned, and sworn to testify the whole truth and nothing but the truth in said case; that the said witnesses did thereupon depose as appears by the foregoing depositions, which were reduced to writing in the presence of the said witnesses and when completed were read over to the said witnesses and signed by them as and for their respective depositions in my presence, and that the foregoing is a truthful record of all the proceedings had and evidence, both oral
212 and documentary, which was introduced before me by the counsel for the respective parties herein.

I further certify that I am not of counsel or attorney to either of the parties in said cause or in any way interested in the event thereof.

In testimony whereof I have hereunto set my hand and
[SEAL.] official seal, at said city of New York, this — day of October, A. D. 1884.

WM. ZABRISKIE,
Notary Public (3), *N. Y. Co.*

213 Circuit Court of the United States, District of Delaware.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrators, &c., of C. Brown Snyder, Deceased,
vs.
ELIZABETH B. MCCOMB, Executrix, &c., of Henry S. McComb, Deceased.

UNITED STATES OF AMERICA,
District of Massachusetts.

Be it remembered that on Wednesday, the first day of October, in the year of our Lord one thousand eight hundred and eighty-four, at Boston, in said district of Massachusetts, before me, John G.

Stetson, clerk of the United States circuit court for the district of Massachusetts, personally appeared Charles Marsh, of said Boston, and Henry Mulliken, in said district, witnesses for the complainants in a certain civil suit depending in the circuit court of the United States in and for the district of Delaware, wherein George A.
214 Frink and Esther S. Snyder, administrators, &c., of C. Brown Snyder, deceased, are complainants, *v.* Elizabeth B. McComb, executrix, &c., of Henry S. McComb, deceased, defendant.

And the said Charles Marsh and the said Henry Mulliken, being by me first severally carefully examined and cautioned and sworn to testify the whole truth relative to the issues, did severally depose and say in answer to direct interrogatories proposed by Hamilton Wallis, for the complainants, and to cross-interrogatories by Francis N. Bangs, for the defendant, as appears by the following depositions, namely:

Deposition of Charles Marsh.

Direct examination by HAMILTON WALLIS, Esq., of counsel for complainants:

Int. 1. What is your name, age, residence, and occupation?

A. Charles Marsh; 54; Boston; merchant.

Int. 2. Are you a member of the firm of Jordan, Marsh & Co., of Boston?

A. I am.

Int. 3. How long have you been a member of that firm?
215 A. Since the first day of 1851.

Int. 4. Did you know Mr. C. Brown Snyder in his lifetime?

A. I did.

Int. 5. Did you know Mr. Henry S. McComb in his lifetime?

A. I did.

Int. 6. Do you remember a conversation which took place between yourself and Mr. McComb in relation to stock in the Southern Railroad Association at the office of the association, in the city of New York, about the year 1873?

A. I do.

Int. 7. Who were present on that occasion?

A. Mr. McComb, Mr. Snyder, and myself.

Int. 8. Please state the conversation.

A. Mr. Snyder and myself walked down from the hotel together to the office of the association, and there was to be a meeting that day of the directors. We arrived there some little time before the meeting. Soon after we arrived Mr. McComb came in and said good morning, passed the time of the day, and says: "Now, gentlemen, to-day I am prepared to offer you cost and interest of your stock." I had to guarantee Mr. Snyder that before *he* would take his at all; but this isn't anything that you want to sell, this
216 stock. He considered it worth three or four for one; that was all, I believe.

Cross-examination.

By FRANCIS N. BANGS, Esq., of counsel for defendant:

Cross-int. 9. When was this conversation?

A. I should think in the latter part of 1872 or the early part of 1873.

Cross-int. 10. Where did you and Snyder stop then?

A. In the Fifth Avenue hotel.

Cross-int. 11. Have you given the whole of the conversation?

A. Yes.

Cross-int. 12. Then, according to your recollection, Mr. McComb did all the talking, did he?

A. I think he did.

Cross-int. 13. Neither you nor Snyder said anything?

A. We both said "good morning."

Cross-int. 14. Is that all that was said by you or Snyder?

A. Yes; that was all.

217 Cross-int. 15. Did you silence arise from surprise or astonishment or any other disability?

A. I don't think it did; it was a very short time before the time of the meeting.

Cross-int. 16. How long before the meeting?

A. I should think five minutes or so.

Cross-int. 17. Did that leave you time enough to answer his proposition?

A. I should think so.

Cross-int. 18. What kept you silent?

A. I don't know of anything. Mr. McComb was in the room and Snyder went away.

Cross-int. 19. Was that what kept you silent?

A. I don't know that it was.

Cross-int. 20. Was your silence voluntary or compelled?

A. I shouldn't say it was compelled.

Cross-int. 21. Would you say it was voluntary?

A. I should say it was; yes.

Cross-int. 22. What was your motive for voluntary silence?

218 A. I don't know, except that neither of us wanted to sell at that time.

Cross-int. 23. Is that your memory?

A. Yes.

Cross-int. 24. Were you willing to sell at three or four for one?

A. I should say yes.

Cross-int. 25. Why did you not do so?

A. We were not offered three or four for one.

Cross-int. 26. Did you believe what Mr. McComb told you?

A. Yes.

Cross-int. 27. What percentage of the par had the stock cost?

(Objected to as immaterial.)

A. I think, without knowing exactly, we got 2,330 shares for $133,000.

Cross-int. 28. Then you understand McComb to offer you about sixty and interest for what he said was worth three or four hundred?

A. The stock was a hundred, and he offered par and interest. I think this is what it was.

219 Cross-int. 29. Then were you mistaken in saying he offered cost and interest?

A. Yes; it was par and interest.

Cross-int. 30. Then did you understand him to offer par and interest for what he said was worth three or four hundred?

A. Yes.

Cross-int. 31. Have you been accustomed to buying and selling goods and merchandise and other things for many years?

A. Yes, sir.

Cross-int. 32. In your experience before that conversation had you ever known of such a thing as a buyer offering the owner a third or a quarter of what the buyer said the thing was worth?

A. I don't know that I ever had.

Cross-int. 33. Has any such thing occurred in your experience since?

A. No; I don't think it has.

Cross-int. 34. Then does not that occurrence stand out solitary, singular, eccentric, unprecedented, unparalle-d, and unimitated in your experience?

220 A. I think it does.

Cross-int. 35. Did not duch an offer raise a doubt in your mind of his sincerity when he said he was willing to buy it?

(Objected to as immaterial.)

A. No; because he told me at different times this was a very valuable thing.

Cross-int. 35½. Which do you consider the best test of value, what a man actually offers to pay you down on the spot or what he says the thing is worth when he says it is worth three or four times what he offers to pay?

(Same objection.)

A. What a man would give for a thing.

Cross-int. 36. Considering your mercantile experience, has it not been the natural tendency of observation that a thing is worth more than the price offered to deter the owner from selling at that price and holding onto a price nearer the value?

(Same objection.)

A. That it would be apt to make a man hold on.

221 Cross-int. 37. McComb was not a fool, was he, at the time of that conversation?

A. I don't think he was?

Cross-int. 38. Was not he shrewd enough, according to your ob-

servation, to know that his statements were fitted to strike you silent?

(Objected to as incompetent and immaterial.)

A. Didn't have that effect on me, as in previous conversations he had spoken of this thing as being of great value.

Cross-int. 39. Is that the reason you were silent?

A. I should think it was.

Cross-int. 40. You did not think his offer worth a word in reply, did you?

(Objected to as immaterial.)

A. I had no idea of selling at that price from what he had said to me himself.

Cross-int. 41. Was he not shrewd enough, according to your observation of him, to know that you would consider his offer a paltry one and that you would probably remain silent?

(Objected to as incompetent and immaterial.)

222 A. He might have been; when he made that offer I thought he meant what he said.

Cross-int. 42. Did you think that he meant to induce you to sell by telling you you would sacrifice two or three hundred per cent.?

(Objected to as immaterial.)

A. No; I don't think he did.

Cross-int. 43. Was that your reason for keeping silent, to wit, that you didn't want to sell at the offer and that his statements made then and previously deterred you from accepting it?

A. Certainly.

Cross-int. 44. Were any assessments ever levied on your stock?

(Objected to as immaterial.)

A. I think so.

Cross-int. 45. State as near as you can to what amount.

(Same objection.)

A. I don't recollect.

Cross-int. 46. Was that a general assessment on the stockholders?

(Same objection, and also as incompetent.)

223 A. I believe it was.

Cross-int. 47. Did it not amount to at least 80 per cent.?

(Objected to as immaterial.)

A. My impression is that it was much less, but I can't remember.

Cross-int. 48. Were you not examined as a witness in a suit tried in Boston in 1878, in which Snyder was plaintiff and McComb was defendant?

A. I was a witness in that suit. I don't remember whether it was 1878 or 1879.

Cross-int. 49. Did McComb say he had guaranteed Snyder cost and interest or par and interest?

A. I think it was par and interest.

Cross-int. 50. Did you not testify on the aforesaid trial that McComb said, I had to guarantee that to Mr. Snyder, cost and interest, before he would go into this thing at all, and that you did not remember anything more that was said then, except that casually McComb said that "it was a thing we did not either of us want to sell; that he considered it worth three for one and probably four"?

(Objected to as incompetent.)

224 A. Yes.

Cross-int. 51. Was that testimony correct? If not, what error was there in it?

A. It was par instead of cost.

Cross-int. 52. What made you on that trial say cost?

A. I don't know, I am sure.

Cross-int. 53. You meant to state it truly, did you not, and you stated it as you then remembered it, did you not?

A. I certainly meant to state it truly. I don't see how I can answer the question whether I stated it as I then remembered it. I don't see how I could have so stated it. I knew there was a profit.

Cross-int. 54. Could not your answer be accounted for upon the theory of forgetfulness or inaccurate memory?

A. No; I don't see how it could.

Cross-int. 55. The error was not willful, was it?

A. No.

Cross-int. 56. You would not have testified to anything except as you remembered it at the time, would you?

225 A. I should think not.

Direct examination resumed:

Cross-int. 57. Could not the record of your testimony as it appears in the printed book of the trial of the cause referred to in your cross-examination, where you are made to say "for cost and interest," have resulted from an error in transcribing?

(Objected to as incompetent and immaterial.)

A. Yes.

Cross-examination resumed:

Cross-int. 58. May not the shape of the record result from accuracy in transcribing?

A. It may, but I don't see how I ever swore to cost and interest.

Cross-int. 59. What made you swear to-day that it was cost and interest? Was it an error in transcribing?

A. I was thinking that cost was par.

Cross-int. 60. What made you say that McComb said cost and interest except that you so remembered?

A. I don't know except thinking the same thing—that cost was par.

226 Cross-int. 61. But the question being what McComb said. Why did you put the word cost into his mouth on that former trial?

A. I don't see how I could except thinking that cost was par.

Cross-int. 62. Were you not mistaken in thinking that cost was par?

A. Yes.

Cross-int. 63. Was that mistake willful?

A. No.

Cross-int. 64. Did it not arise from forgetfulness?

A. No; I don't think so.

Cross-int. 65. When you made the mistake you had in mind the difference between cost and par, did you?

A. No.

Cross-int. 66. Well, if it was not in your mind it was out of your mind, wasn't it?

A. I suppose so.

Cross-int. 67. If that absence of mind or absence from your mind was neither willful nor neglectful, pray tell us what adjective fits it.

227 A. It was a mistake.

(Signed) CHAS. MARSH.

Attest: JOHN G. STETSON,
Clerk U. S. Circuit Court, Mass. Dist.

Deposition of Henry Mulliken.

Direct examination by HAMILTON WALLIS, Esq., of counsel for complainants:

My name is Henry Mulliken. I reside in Milton, Massachusetts. My age, 52. Am not engaged in any business. In 1868 I acquired an interest in the Southern Railroad Association for $10,000, which represented eventually 174 shares of the stock of that corporation. I knew Henry S. McComb in his lifetime. In the spring of 1873 I had a conversation with him in relation to the value of those shares, the only part of which conversation I now recollect is that he offered to pay me $25,000 for my said interest. I did not give him any definite answer at the time, but within a few days agreed by letter to accept that amount for my stock. I received no answer to that letter, but within two or three months saw Col. McComb, who
228 told me that he had recently received my letter, but that his offer was not open; he had no money and did not care to take the stock. In the autumn of the same year I had another conversation with Col. McComb, in which he offered me $17,000 for my said interest, which I declined.

(The whole of the above testimony and each and every part and clause thereof is objected to by counsel for defendant in due season.)

Cross-examination.

By FRANCIS N. BANGS, Esq., of counsel for defendant:

I bought my stock of Henry Lewis. I paid $10,000 and received 174 shares, which was about at the rate of sixty.

Cross-int. Did you regard McComb's offer as furnishing any test or standard of value?

A. I did.

Cross-int. Did his offer of $25,000 make any impression, and what impression, upon you as to the value of the stock?

A. It made some impression and an impression that the stock was worth more than I had supposed before. I do not re-
229 member what impression his refusal to take it at $25,000 made upon me as to the value of the stock. His offer of $17,000 gave me the impression that the stock was worth less. I mean less than I had supposed it to be worth. I should think, to the best of my recollection, there was an interval of rather more than four months between his offers. I don't think that, looking at my testimony in the suit of Snyder *vs.* McComb, tried here in Boston, would refresh my recollection. I don't remember whether or not on that trial I testified that my impression was that the higher offer was made in May and the lower offer, perhap*ds*, in September, but that I couldn't say positively. I may have so testified, but I don't remember. My testimony given on that trial was correct according to my then recollection.

Cross-Q. I now show you the book heretofore marked A for identification, where you are reported as having testified in these words: "My impression is that the higher offer was made in May and the lower offer, perhaps, in September. I can't say positively." Do you wish or care to change it?

A. I do not. I have no copy of my letter to McComb. I do not remember the words in which he expressed himself when
230 he made the offer of $25,000. It was in Mr. Walter Lewis' house—after dinner, at that house, between 7 and 11 p. m., as near as I remember. My impression is Mr. McComb came in after dinner, but not by appointment with me. I do not remember any other subject that was talked about. I do not recollect what else was said in relation to this stock, but that there was other conversation of which this was the outcome.

(Signed) HENRY MULLIKEN.

Attest: JOHN G. STETSON,
Clerk U. S. Circuit Court, Massachusetts District.

UNITED STATES OF AMERICA, }
District of Massachusetts. }

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, in the first judicial circuit, certify that the reason for taking the foregoing depositions is and the fact is that the said Charles Marsh and the said Henry Mulliken are

material and necessary witnesses in the cause in the captions
231 in said depositions named; that the said Charles Marsh lives at Boston and the said Henry Mulliken lives at Milton, both Boston and Milton being in said district of Massachusetts; that said Boston and said Milton are each a greater distance than one hundred miles and the place of taking the depositions is more than one hundred miles from the place of trial of the cause for and in which said depositions are taken.

I further certify reasonable notice of the taking of said depositions was given, which notice and the acceptance of service thereof is hereto prefixed.

I further certify that on the first day of October, A. D. 1884, I was attended at the office of the clerk of the circuit court of the United States, 140 Tremont street, in Boston, in said district of Massachusetts, by the counsel for the respective parties to said cause and by the said Charles Marsh and Henry Mulliken, the said witnesses; that each of said witnesses, being of sound mind and lawful age, was by me first duly examined, cautioned, and sworn to testify the whole truth and nothing but the truth in said case; that the said witnesses did thereupon depose as appears in the fore-
232 going depositions, which were reduced to writing in the presence of the said witnesses, and when completed were read over to the said witnesses and signed by them as and for their respective depositions in my presence.

I further certify that I am not of counsel or attorney to either of the parties in said cause or in any way interested in the event thereof.

In testimony whereof I hereunto set my hand and the seal of the said circuit court, at Boston, in said district, this first day of October, A. D. 1884.

[SEAL.] (Signed) JOHN G. STETSON, *Clerk.*

233 United States District Court, District of Delaware.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix, &c., of C. Brown Snyder, Deceased,
against
ELIZABETH B. MCCOMB, Executrix, &c., of Henry S. McComb, Deceased.

It is hereby stipulated by and on behalf of the respective parties hereto that no objection shall be raised to the mode, manner, or regularity of the taking of the foregoing proofs or of the certifying the same by the respective officers before whom they were taken.

November 5, 1884.

BATES & HARRINGTON,
Sol'rs for Def'ts.
GEORGE GRAY,
Sol.s for Compl't.

234 FRINK
vs.
MCCOMB.

NEW YORK, *February* 7, 1885.

The proceedings having been from time to time regularly adjourned to this day, the respective parties appear.

The following proofs are taken on behalf of the defendant:

Defendant produces and offers in evidence the exemplification of a record of a suit in the supreme judicial court of the State of Massachusetts between C. Brown Snyder, plaintiff, and Henry S. McComb, defendant.

(Objected to as immaterial and irrelevant.)

Paper marked Defendant's Exhibit 1, February 7, 1885.

Adjourned to Saturday, February 14, 1885, at 3.30 o'clock, at Mr. Wilson's office.

COMMONWEALTH OF MASSACHUSETTS:

235 I, Marcus Morton, chief justice of the supreme judicial court of the Commonwealth of Massachusetts, do certify that John Noble, Esquire, whose signature is affixed to the papers hereto annexed, is clerk of said court, holden at Boston, in and for the county of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said court throughout the Commonwealth down to the first day of August, A. D. 1797, as well as of the files, records, and proceedings of said court holden as aforesaid for said county of Suffolk subsequent to that time, and is by law the proper person to make out and to certify copies of all the records and proceedings of the said supreme judicial court previous to the said first day of August, A. D. 1797, as well as of all records and proceedings of the said court holden as aforesaid for the said county of Suffolk subsequent to that time, and that full faith and credit is and ought to be given to his acts and attestations done as aforesaid, and that his attestation to the papers hereunto annexed is in due form.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed this thirty-first day of May, in the year one thousand eight hundred and eighty-four.

MARCUS MORTON.

236 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, begun and holden at Boston, within and for our county of Suffolk, on the second Tuesday of September, being the tenth day of said month, in the year of our Lord one thousand eight hundred and seventy-eight, it is thus contained:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

[L. S.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Henry S. McComb, of Wilmington, in the State of Delaware, now commorant of Boston, in our said county of Suffolk, to the value of one hundred thousand dollars, and summon the said McComb (if he may be found in your precinct) to appear before our justices of our supreme judicial court, next to be holden at Boston, within and
237 for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto C. Brown Snyder, of the city, county, and State of New York, having his principal place of business in said Boston, in an action of tort or of contract, it being deemed doubtful to which of those classes this cause of action belongs, a count in contract being joined with a count in tort, both being for one and the same cause of action, to the damage of the said Snyder (as he say-) the sum of one hundred thousand dollars, which shall then and there be made to appear, with other due damages; and have you there this writ with your doings therein.

Witness Horace Gray, Esquire, at Boston, the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and seventy-five.

JOHN NOBLE, *Clerk.*

Upon which writ is the following return of the officer who served the same, viz:

SUFFOLK, *ss:*

BOSTON, *Oct.* 26, 1875.

By virtue hereof I this day attached a ship as the property
238 of the within-named Henry S. McComb and delivered to him in hand a summons for his appearance at court, as within directed.

JOHN B. O'BRIEN,
Dep. Sheriff.

Service and travel, $1.08.

COUNTY OF SUFFOLK, *ss:*

I, C. Brown Snyder, the plaintiff in this writ, before the service thereof, on oath declare that I verily believe the matter sought to be recovered in the action hereby commenced actually equals in amount or value the sum of four thousand dollars.

C. BROWN SNYDER.

Subscribed and sworn to this twenty-fifth day of October, A. D. 1875, before me—

BENJAMIN F. BROOKS,
Justice of the Peace.

And upon the day on which said writ was returnable the plaintiff, upon entering the same, filed his declaration as follows, to wit:

239 SUFFOLK, *ss:*

Supreme Judicial Court, April Term, 1876.

C. B. SNYDER
v.
H. S. MCCOMB.

Plaintiff's Declaration.

And the plaintiff says that on or about the first day of August, in the year eighteen hundred and sixty-nine, he made a certain agreement with the defendant, whereby the defendant agreed with him that if he would place in his, the defendant's, hands the sum of forty-two thousand dollars that the defendant would purchase therewith six hundred shares in the capital stock of the Southern Railroad Association, a corporation established under the laws of the States of Mississippi and Tennessee, and would cause the said shares of stock to be assigned and transferred to the plaintiff, so as to give him the entire possession and control over the same, and, further, that he, the defendant, would at any time when thereto requested by the plaintiff take the said stock from him and repay to
240 the plaintiff the said sum of forty-two thousand dollars, together with all other sums paid by him or any person for him for assessments upon said stock, with interest upon all said sums, so that the plaintiff should receive all sums of money paid by him for or on account of said stock, with interest; and the plaintiff says that, relying upon the defendant's promises and agreements and in accordance with the said agreement, he paid to the defendant the said sum of forty-two thousand dollars and the further sum of four thousand one hundred dollars for an assessment on said stock, but the defendant did not purchase therewith the said six hundred shares of stock or any shares whatever, and did not have said stock or any stock whatever assigned and transferred to the plaintiff or in any way give him possession and control of the same, but, though often requested, has neglected and refused and still neglects and refuses so to do; and the plaintiff further says that on or about the first day of August, in the year eighteen hundred and sixty-nine, he made a certain agreement with the defendant, whereby the defendant agreed with him that if he would place in his, the defendant's, hands the sum of forty-two thousand dollars that the defendant would purchase therewith six hundred shares in the
241 capital stock of the Southern Railroad Association, a corporation established under the laws of the States of Mississippi and Tennessee, and would cause the said shares of stock to be assigned and transferred to the plaintiff, so as to give him the entire possession of and control over the same, and, further, that he, the defendant, would at any time when thereto requested by the plaintiff take the said stock from him and repay to the plaintiff the said sum of

forty-two thousand dollars, together with all other sums paid by him or any person for him for assessments upon said stock, with interest upon all said sums, so that the plaintiff should receive all sums of money paid by him for or on account of said stock, with interest; and the plaintiff says that, relying upon the defendant's promises and agreements and in accordance with the said agreement, *be* paid to the defendant the said sum of forty-two thousand dollars and the further sum of four thousand one hundred dollars for an assessment on said stock, and the defendant purchased therewith said six hundred shares of stock but did not cause said shares of stock or any part thereof to be assigned and transferred to the plaintiff so
242 as to give him the entire possession and control of the same, but caused a certificate or certificates for the same to be issued to him, the defendant, in his own name and has ever since dealt with and controlled the same as his own, and, though often requested, has neglected and refused and still neglects and refuses to transfer the same or any part thereof to the plaintiff or to give him any possession of or control over the same.

And the plaintiff further says that on or about the first day of August, in the year eighteen hundred and sixty-nine, he made a certain agreement with the defendant, whereby the defendant agreed with him that if he would place in his, the defendant's, hands the sum of forty-two thousand dollars that the defendant would purchase therewith six hundred shares in the capital stock of the Southern Railroad Association, a corporation established under the laws of the States of Mississippi and Tennessee, and would cause the said shares of stock to be assigned and transferred to the plaintiff, so as to give him the entire possession and control over the same, and further, that he, the defendant, would at any time when thereto requested by the plaintiff take the said stock from him and repay to the plaintiff the said sum of forty-two
243 thousand dollars, together with all other sums paid by him or any person for him for assessments upon said stock, with interest upon all said sums, so that the plaintiff should receive all sums of money paid by him for or on account of said stock, with interest; and the plaintiff says that, relying upon the defendant's promises and agreements and in accordance with the said agreement, he paid to the defendant the said sum of forty-two thousand dollars and the further sum of four thousand one hundred dollars for an assessment on said stock, and the defendant purchased therewith said six hundred shares of stock and caused a certificate or certificates for the same to be issued to him, the defendant, in his own name and has ever since retained the same under his control; and the plaintiff says that thereafter, to wit, on or about the fifteenth day of February, in the year eighteen hundred and seventy-four, he offered to release to the defendant all his claim to and interest in said shares of stock so standing in defendant's name and requested the defendant to pay him the sums of money paid by him as aforesaid, with interest on the same, as by his said agreement the defendant was bound to do, but he refuses to
244 do so and, though often requested, has ever since neglected

and refused so to do; and the plaintiff further says that the defendant owes him sixty-three thousand and eighty-eight dollars and thirty-eight cents for money had and received to the plaintiff's use.

Bill of Particulars.

H. S. McComb to C. B. Snyder, Dr.

1869.			
(1) August	4th.	To cash paid you for my subscription to six hundred shares in the stock of the Southern Railroad Association	$42,000 00
1870.			
(2) August	25th.	To cash paid on account of same	4,100 00
1875.			
(3) October	29th.	To interest on $42,000 from August 4th, 1869, to date	15,714 72
(4) October	29th.	To interest on $4,100 from August 25th, 1870, to date	1,273 66
			$63,088 38

And the plaintiff further says that the defendant has converted to his own use six hundred shares of the capital stock of the Southern Railroad Association, a corporation duly established by the laws of the States of Mississippi and Tennessee, the property of the plaintiff.

BROOKS, BALL & STOREY,
For Plaintiff.

245 This action was entered in our said supreme judicial court at the April term thereof, in the year eighteen hundred and seventy-six, when and where the parties appeared, and the defendant, by Russells & Suter, Esquires, his attorneys, filed his answer and demurrer as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court, April Term, 1876.

C. BROWN SNYDER
vs.
HENRY S. MCCOMB.

Answer of Defendant.

And now comes the said defendant, Henry S. McComb, and denies each and every allegation in each and every count of the plaintiff's declaration as fully and particularly as if this denial was specifically repeated as to each and every allegation of each and every of said counts.

And the defendant further denies that he owes the plaintiff sixty-three thousand and eighty-eight and $\frac{38}{100}$ dollars or any sum
246 whatever, as set forth in the plaintiff's account annexed to his said declaration, and he denies each and every item in said account set forth; and the defendant denies that he converted to his own use six hundred shares or any shares of the capital stock of the Southern Railroad Association, the property of the plaintiff; and the defendant, further answering, says that the cause of action mentioned in the plaintiff's writ did not accrue within six years before the suing out of the plaintiff's writ.

By his attorneys, RUSSELLS & SUTER.

And for further answer the defendant demurrs to each and every count in said declaration contained, except the last count in tort, and for special cause assigns that neither of said counts states a legal cause of action substantially in accordance with the rules of law and in this, that neither of said counts sets out or alleges any time within which the said alleged contracts or either of them were or are to be performed, and it doth not appear from either of said counts when the said alleged contracts or either of them were to be performed or whether any cause of action had arisen thereon at the date of plaintiff's writ, and, further, that the plaintiff
247 doth not allege in either of said counts that he made any specific demand or request on the defendant to take or to transfer the stock or to pay any money under the alleged contracts or either of them.

By his attorneys, RUSSELLS & SUTER.

We certify that we are of the opinion that there is such probable ground in law for the foregoing demurrer as to make it a fit subject for judicial inquiry and trial, and that it is not intended for delay.

RUSSELLS & SUTER,
Def't's Attorneys.

(Filed May 3, 1876.)

And said defendant also filed his petition that the same be removed to the circuit court of the United States for trial and filed his bond, with sureties, pursuant to the statute in that behalf provided, and it was thereupon ordered by our said supreme judicial court to be removed accordingly.

And at the April term, eighteen hundred and seventy-eight, of our said supreme judicial court the case was remanded from said circuit court of the United States for want of jurisdiction,
248 and the plaintiff, by leave of our said court, thereupon filed his amended declaration as follows, to wit:

SUFFOLK, *ss*:

Supreme Judicial Court, April Term, 1878.

G. BROWN SNYDER
vs.
HENRY S. MCCOMB.

Plaintiff's Amended Declaration.

And now comes the plaintiff and with leave of court first obtained amends his declaration heretofore filed in this case by striking out the first four counts thereof and inserting the following:

And the plaintiff says that in the month of July, eighteen hundred and sixty-nine, the defendant had in his hands or possession a large sum of money belonging to the plaintiff, to wit, the sum of forty-five thousand dollars, and that in said month of July, to wit, on the fifteenth day thereof, the defendant, in consideration that the plaintiff would leave in his, the defendant's, hands said sum of money and would allow him to retain the same, promised the plain-
249 tiff that he would immediately purchase therewith a certain number of shares in the capital stock of an association known as the Southern Railroad Association, to wit, six hundred shares, or would cause certificates for said shares to be issued by said association to the plaintiff and to be delivered to him as soon as the stock in said Southern Railroad Association was issued; and, further, that he, the defendant, would at any time, when requested thereto by the plaintiff, take the said shares from the plaintiff and pay him the said sum of forty-five thousand dollars, with interest at the rate of seven per centum per annum from the said fifteenth day of July; and the plaintiff says that relying upon said promises so made by the said defendant he allowed the defendant to retain the said sum of forty-two thousand dollars, but the defendant did not purchase therewith any shares in the capital stock of said Southern Railroad Association, and that thereafter, to wit, in the month of September, in said year, the stock in said Southern Railroad Association was issued, but the defendant did not cause certificates for any shares in the capital stock of said Southern Railroad Association to be issued to the plaintiff and to be delivered to him.

250 And the plaintiff says that thereafter, in the year eighteen hundred and seventy-four, to wit, on the nineteenth day of June, in said year, and also on the eighteenth day of August, in said year, the plaintiff demanded of the defendant the payment of said sum of forty-five thousand dollars, with interest at the rate of seven per centum per annum from the fifteenth day of July aforesaid, and offered upon such payment to release and surrender to the defendant all interest which he might have in any stock in said Southern Railroad Association, but the defendant neglected and refused and has ever since neglected and refused to pay to the plaintiff said sum of forty-five thousand dollars and interest as aforesaid, and still owes the plaintiff the same.

And the plaintiff further says that the defendant owes the plaintiff

the sum of forty-five thousand dollars for money had and received by the defendant to the plaintiff's use and the further sum of sixteen thousand nine hundred and seventy-eight $\frac{50}{100}$ dollars, interest thereon.

251 *Bill of Particulars.*

(1) To cash retained by you to be applied to purchase of stock in Southern Railroad Association	$45,000 00
(2) To interest on same, July 15, 1869, to October 29, 1875	16,978 50
	$61,978 50

BROOKS, BALL & STOREY,
For Plaintiff.

(Filed by leave of court July 30, 1878.)

And said defendant, by leave of court, thereupon filed his answer and demurred to said amended declaration as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, April Term, 1878.

C. BROWN SNYDER
vs.
HENRY S. MCCOMB.

Defendant's Answer to Amended Declaration.

252 And now comes the defendant, and for answer to the plaintiff's amended declaration says, in answer to the first count thereof, that he denies each and every allegation therein contained as fully, particularly, and to the same effect as though this denial was specifically made to each and every of said allegations, and he denies that he owes the plaintiff the sum of forty-five thousand dollars, with interest as alleged, or any sum whatever.

And in answer to the second count thereof the defendant denies each and every allegation therein contained and each and every item in the bill of particulars thereto annexed as fully and particularly as though a specific denial was made to each allegation and item.

And the defendant, not waiving the above denials, for further answer says that the cause of action mentioned in the plaintiff's writ did not accrue within six years before the suing out of the plaintiff's writ.

H. S. MCCOMB,
By His Attorneys, C. T. & T. H. Russell.

And for further answer the defendant demurs to the third count in the plaintiff's declaration as now amended and for special cause

assigns that the matters therein contained are not sufficient
253 in law for the plaintiff to have his action against the defendant, in that it is alleged therein that the defendant has converted to his own use shares of stock and no certificate of stock is alleged to have been converted.

H. S. McCOMB,
By His Attorneys, C. T. & T. H. Russell.

We certify that we are of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended for delay.

C. T. & T. H. RUSSELL,
Defendant's Attorneys.

(Filed Sept. 5, 1878.)

Thence the action was continued unto the September term, eighteen hundred and seventy-eight, when and where the parties appearing, and the defendant, by his attorneys, filed his motion to amend said petition for removal to the circuit court of the United States, and also filed a new petition for removal thereto, with bond; which motion and filing of new petition, after a full hearing, was denied.

254 Thereupon the plaintiff filed his motion to amend into a bill in equity as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Supreme Judicial Court, September Term, 1878.

C. BROWN SNYDER *vs.* HENRY S. McCOMB. } In Equity.

Bill of Complaint.

To the honorable justices of the supreme judicial court, sitting in equity:

C. Brown Snyder, of the city, county, and State of New York, brings this bill against Henry S. McComb, of Wilmington, in the State of Delaware, and alleges:

First. That in the year A. D. eighteen hundred and sixty-nine, for a valuable consideration, to wit, the sum of forty-four thousand seven hundred and nine dollars and thirty-eight cents, the said respondent executed a declaration of trust, a copy whereof is as follows:

To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with
255 Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid.

This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself.

H. S. McCOMB, *Trustee.*

Second. That prior to the execution thereof and in order to induce the complainant to receive and accept the same and the stock therein described, the respondent promised the complainant that if at any time afterward the complainant became dissatisfied with the investment and desired to get out of it the respondent would pay back to the complainant the principal and interest at the rate of seven per cent. per annum.

Third. That in the months of June, July, and August, A. D. 1874, the complainant repeatedly requested the respondent to transfer and convey to the complainant the shares of stock named in said certificate and to perform the trust in said declaration set forth, which the respondent wholly neglected and refused to do.

256 Fourth. That in the month of July, A. D. 1874, the complainant requested the respondent to pay back to the complainant the principal and interest at the rate of seven per cent. per annum, to wit, forty-four thousand seven hundred and nine and $\frac{38}{100}$ dollars, with interest from November twenty-third, A. D. 1869, which the respondent wholly neglected and refused to do.

Fifth. That the respondent hath not held or kept the stock belonging to the complainant, but has parted with and transferred away and appropriated the same to his own use and has become liable to the complainant for the value thereof.

Sixth. That the complainant hath no plain, adequate, and complete remedy at common law, but only in equity.

Whereupon the complainant prays:

First. That the respondent may be required to answer this bill, but not under oath, an answer under oath being expressly waived.

Second. That the trust set forth in said instrument may be declared established and set forth and the execution thereof decreed.

257 Third. That the respondent may be decreed to pay the complainant the sum of forty-four thousand seven hundred and nine and $\frac{3}{100}$ dollars, with interest at the rate of seven per cent. per annum from said November twenty-third, A. D. 1869, or such other sum as to the court may seem equitably due from respondent to the complainant.

Fourth. For such other and further relief as the nature of the case requires.

C. B. SNYDER,
By BROOKS, BALL & STOREY,
His Solicitors.

DWIGHT FOSTER,
BROOKS, BALL & STOREY,
Of Counsel.

(Filed Dec. 21, 1878.)

Which motion, after a full hearing before Mr. Justice Ames, was overruled.

Thereupon the parties appeared and, after a full hearing by our said court without a jury, the following finding was made in said case, viz:

258 C. BROWN SNYDER
vs.
HENRY S. MCCOMB.

In the above-entitled cause, heard by the court without a jury, the court finds for the defendant.

SETH AMES, *J. S. J. C.*

(Dec. 23d, 1878.)

Thereupon said supreme judicial court did order that judgment be entered upon said finding.

It was therefore considered by our said supreme judicial court, on the sixth day of February, A. D. eighteen hundred and seventy-eight, that the said C. Brown Snyder in his action against the said Henry S. McComb hath not maintained, and that the said Henry S. McComb recover against the said C. Brown Snyder costs of suit taxed at —.

And on the twentieth day of January, A. D. eighteen hundred and seventy-nine, the following agreement was filed in this case, to wit:

259 SUFFOLK, *ss:*

Supreme Judicial Court, September Term, 1878.

C. BROWN SNYDER
v.
H. S. MCCOMB.

In the above-entitled case it is agreed that judgment may be entered satisfied.

BROOKS, BALL & STOREY,
For Plaintiff.
C. T. & T. H. RUSSELL,
For Defendant.

(Filed Jan. 20, 1879.)

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said supreme judicial court to be hereto affixed.

[SEAL.] Witness Marcus Morton, Esquire, chief justice of our said court, at Boston, this thirty-first day of May, A. D. eighteen hundred and eighty-four.

JOHN NOBLE, *Clerk.*

260 FRINK *vs.* McCOMB.

NEW YORK, *February* 21, 1885.

The proceedings having been from time to time regularly adjourned until this date, the respective parties appear by their counsel, respectively.

The defendant's counsel offers in evidence an extract from the statute of the State of Massachusetts, as follows:

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1865.

Chapter 179. An act allowing certain amendments in the forms of civil actions.

SECTION 1. The superior court and the supreme judicial court may in their discretion, and upon such terms as they may deem just, allow amendments changing a suit at law into a proceeding in equity, or a proceeding in equity into a suit at law, if the same be necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought.

261 SECTION 2. If any proceeding in equity shall be so changed by amendment into a suit at law, the supreme judicial court shall nevertheless retain jurisdiction thereof, whether or not it be a case of which they would have had original jurisdiction. If any suit at law shall be changed into a proceeding in equity, the same shall forthwith be removed by the plaintiff to the supreme judicial court.

SECTION 3. The supreme judicial court may, in case of such change, make any necessary orders as to further service, the joinder of new parties or the pleadings.

(Plaintiff's counsel objects as immaterial and irrelevant.)

Defendant's counsel offers in evidence from the book which has been heretofore marked "A for identification" the testimony of Henry S. McComb, from pages 103 to 181, including the documents therein referred to, particularly the examination of Mr. McComb taken in New York, referred to in his Boston testimony, and also the testimony of Mr. McComb from page 191 to page 199, and also the deposition of William G. Wilson and the papers thereto at-

262 tached, appearing at pages 239 to 259, inclusive, of the said book, which has been marked "Exhibit A for identification."

(Plaintiff's counsel objects as immaterial, irrelevant, and incompetent, no objection, however, being taken upon the ground that the book marked "A for identification" is a copy and not an original.)

The portion of the record offered in evidence is as follows:

HENRY S. MCCOMB sworn.

(By Mr. BANGS:)

Int. 1. You are the defendant in this suit?
Ans. Yes, sir.
Int. 2. Where do you reside?
Ans. Wilmington, Delaware.
Int. 3. You, of course, remember an organization known as the Southern Railroad Association?
Ans. Yes, sir.
Int. 4. What were your relations to that association?
A. Stockholder, vice-president, and president.
Int. 5. When were you president?
Ans. In 1871.
Int. 6. And not before?
263 Ans. No, sir; the last part of 1870, perhaps November and December, and 1871.
Int. 7. At that time was it a corporation or an unincorporated joint stock association?
Ans. At the time I was president it was an incorporated company.
Int. 8. At its origin what was it?
Ans. An association of individuals under an agreement to be incorporated.
Int. 9. (Witness is shown a paper.) Are these the original articles of association?
Ans. Yes, sir; these are the original articles of association.
Int. 10. Do you recognize any of the signatures appended to the paper? And, if so, state which.
Ans. I recognize the signatures of Henry S. McComb, H. S. McComb, trustee; Josiah Bardwell, Eben D. Jordan, H. W. Gray, H. D. Newcome, J. B. Alexander, Charles A. Lambard, John L. King, C. H. McCormick, Sam. Tate, S. L. Felton, Henry Lewis. I recognize every signature on the paper. They were made in my presence.
264 Int. 11. Where?
Ans. At the office of J. B. Alexander, 19 Nassau street, New York.
Int. 12. When?
Ans. In June, 1868.

Mr. BANGS: I offer the paper in evidence as far as the date and signatures. I don't know that the substance of it is material. It is dated June 30, 1868, and is in the form of a memorandum of agreement between the parties whose names the witness has stated from the document.

Int. 13. Both signatures, "Henry S. McComb" and "H. S. McComb, trustee," are in your handwriting?
Ans. Both made by myself.
Int. 14. Together with the sums appended?
Ans. Yes, sir.

Mr. BANGS: The subscribers to the document and the amount subscribed are as follows:

Henry S. McComb	$415,000
H. S. McComb, trustee	60,000
Josiah Bardwell	100,000
Eben D. Jordan	175,000
265 H. W. Gray	125,000
H. D. Newcomb	100,000
J. B. Alexander	75,000
Charles A. Lambard	125,000
John L. King	50,000
C. H. McCormick	125,000
Sam'l Tate	50,000
S. L. Felton	25,000
Henry Lewis	50,000

(Subscription paper put in and marked "1, J. M. W. Y." Printed at pp. 58–64 of this record.)

Int. 15. Did those sums aggregate the agreed capital of the concern?

Ans. Fell a little short of it. There were other subscriptions by parties whose names are not entered there.

Int. 16. By what parties?

Ans. Thomas C. Durant and William H. Macy. I believe the entire stock was taken on the day of their meeting.

Int. 17. For whom were you trustee in making the sub-
266 scription for $60,000?

Ans. Josiah Bardwell, for the benefit of his wife, as he stated to me at the time he asked the subscription made.

Int. 18. Were any payments made upon that subscription?

Ans. Not at that time.

Int. 19. At any time?

Ans. Yes, sir.

Int. 20. In what form?

Ans. The first payment was made by Josiah Bardwell's note to the order of H. S. McComb, dated the twenty-sixth day of February.

Int. 21. I show you now the paper, No. 1, which was produced by Mr. Fiske, and ask you if that is the note to which you refer.

Ans. Yes, sir; this is the note to which I refer.

Int. 22. Had there not been a previous note given by Bardwell of which that was a renewal?

Ans. No, sir; I think not.

Int. 23. Did that note pass through your hands at the time of its being given?

267 Ans. It was handed immediately over by me to the treasurer of the company.

Int. 24. And is this your endorsement upon it, "H. S. McComb"?

Ans. That is my endorsement upon it.

Int. 25. And whose is the endorsement below your own?

Ans. John L. King, treasurer of the Southern Railroad Association.

Int. 26. He was the treasurer, was he?

Ans. He was the treasurer.

Mr. FOSTER: So that it is understood that allowing this note to come in without objection does not commit us to admitting a series of transactions between Bardwell and the witness, we have no objection to this particular paper coming in.

AMES, J.: We will take this note now, and if any question arises afterwards we will consider that.

(Note read and marked "2, J. M. W. Y." Date of the cancellation of revenue stamp on note, April 23, 1869.)

268 2, J. M. W. Y.

37,580 dollars. NEW YORK, *Feb.* 26, 1869.

Four months after date I promise to pay to the order H. S. McComb thirty-seven thousand five hundred and eighty dollars at the National Park, value received.

J. BARDWELL.

Endorsed by—
H. S. McCOMB.
JNO. L. KING,
Treas. Southern R. R. Association.

{ United States inter. revenue. Three dollars and fifty cents.
Cancelled. Inter. revenue. 3.50. 3.50. }

{ United States inter. revenue. Fifteen dollars. Cancelled.
Mortgage. 15. 15. }

The cancellation of stamps is "National Bank of N. Y., April 23, 1869.

Int. 27. Look at the paper now shown you, being one of those produced by Mr. Fiske and marked "No. 4," and state if you recognize the signature to that.

Ans. "No. 4" is a paper in the handwriting of Mr. Burrage, who was clerk of the treasurer. It has the signature of John L.
269 King, treasurer, whose signature I recognize as being genuine.

(Paper read and marked "3, J. M. W. Y.")

3, J. M. W. Y.

Rec'v'd from Mr. J. Bardwell, 28 April, 1870, his note 22nd March, 5 mos.	$4,100 00
Rec'v'd from Mr. J. Bardwell, 28 April, 1870, his note 30th March, 5 mos.	4,172 58
	$8,272 58

For am't of assessments of 5% ea. on the subscription of H. S. McComb, trustee, to the capital stock of the Southern R'road Association, including interest thereon, due 1 & 15 March, 1870.

JOHN L. KING, *Treas.*

[Two-cent int. rev. stamp, cancelled.]

Int. 28. I show you Mr. Fiske's paper "No. 13" and ask you whose signature is appended to that.

A. The signature to this is John L. King.

Int. 29. The same John L. King?

A. The same John L. King, treasurer of the Southern Railroad Association.

(Paper dated July 8, 1868, read and marked "4, J. M. W. Y.")

270 4, J. M. W. Y.

Office of the "Southern Railroad Association," No. 19 Broad St.

NEW YORK, *July* 8, 1868.

Rec'd from Josiah Bardwell forty thousand dollars, the same being an assessment of forty per cent. upon his subscription to the capital stock of the Southern Railroad Association.

JOHN L. KING, *Treasurer.*

[Two-cent int. rev. stamp, cancelled.]

Int. 30. Is Mr. King living?

Ans. No, sir.

(Papers "No. 2" and "No. 17" shown to the witness.)

Int. 31. Whose is the signature to "No. 17"?

Ans. The signature is John L. King, treasurer.

Int. 32. Do you know the signature to "No. 2"?

Ans. The signature to "No. 2" is Mr. Burrage, clerk of the treasurer.

(Papers dated September 20, 1869, read and marked "5, J. M. W. Y.")

271 5, J. M. W. Y.

Southern Railroad Association, lessees of the Mississippi Central Railroad Company.

OFFICE OF THE TREASURER,
NEW YORK, *Sept.* 20, 1869.

J. Bardwell, Esq.

MY DEAR SIR,—I enclose statement of stock in the name of H. S. McComb, trustee.

There is now due upon this stock 5 % ass't to-day, $4,000, less $1,662.13 to cr. of the account, $2,337.87.

In accordance with your instructions of the 18th, I have to-day

drawn upon you for the ass't upon the stock standing in your name, viz., $6,665, to the order of J. L. Worth, cash., which please honor.

I am, truly yours &c. JOHN L. KING, *Treas.*

272 Mr. H. S. McComb, trustee, to Southern R. R. Association.

1869.				
March	2.	Am't ass'm't 5 % on $80,000		$4,000 00
		Interest to 30 Sep., 212 d's	164 88	
		Less ch'g'd 23 Apr.	39 67	
				125 21
	11.	Stamps on note		18 50
				$4,143 71

CREDIT.

April	23.	Cash	$5,662 13	
		Interest to 30 Sep., 160 d's	176 14	
				5,838 27
		To crd. of H. S. McComb, trust.		$1,694 56
Sept.	20.	Assessment	$4,000 00	
			1,694 56	
			$2,305 44	

Int. 33. I show you Mr. Fiske's paper "No. 3." Will you state in whose handwriting that is?

A. The face of it is in the handwriting of the clerk of Mr. King, treasurer, Mr. Burrage.

Int. 34. Do you know in whose handwriting the endorsement is?

Ans. Mr. Cutter's—Edwin F. Cutter.

Int. 35. It is not Mr. Burrage's?

Ans. No, sir.

("No. 3" read and marked "6, J. M. W. Y.")

273 6, J. M. W. Y.

Statement of Stock in Name of H. S. McComb, Trustee.

1868.			
July	8.	Am't of 1st ass'm't, 40% on $60,000	$24,000 00
		Interest on do. to 18th Sept., '69—1 year 72 days	2,015 20
1869.			
Jan.	10.	Am't of 2d ass'm't, 10% on $60,000	6,000 00
		Interest on do. to 18th Sept., '69—251 days	292 83
Jan.	2.	(Stock increased to $80,000.)	
		Am't of 1st ass'm't, 5% on the above	4,000 00
March	2.	Interest on do. to 18th Sept., '69—200 days	155 55
			$36,463 58

Int. 36. I show you Mr. Fiske's paper "No. 14" and ask you whose signature that is.

Ans. It is the signature of Mr. King.

(Paper read and marked "7, J. M. W. Y.")

7, J. M. W. Y.

Rec'd Jan. 20, 1869, of Josiah Bardwell ten thousand dollars for assessment of 10% upon his stock in the Southern Railroad Association, due Jan. 10, inst.

JOHN L. KING, *Treasurer.*

[Two-cent int. rev. stamp, cancelled.]

Int. 37. I show you Mr. Fiske's "No. 15," embracing two papers. Whose is the signature to that paper?

274 Ans. This is John L. King's, treasurer, to the letter and Burrage's figures in the appended paper.

Int. 38. Now, I ask you as to the signatures to the two papers composing "No. 16" coupled with "No. 15."

Ans. They are both the signatures of John L. King, treasurer Southern Railroad Association.

(Paper marked "8, J. M. W. Y.")

8, J. M. W. Y.

Mr. J. Bardwell to Southern R. R. Association.

Am't assess's due 2 Mar., '69	$6,665 00
148 days' interest, to 28 July	191 80
	$6,856 80

Draft paid July 29.

Southern Railroad Association, lessees of the Mississippi Central Railroad Company.

OFFICE OF THE TREASURER,
NEW YORK, *July* 28, 1869.

J. B. Bardwell, Esq.

MY DEAR SIR—I have drawn on you for ass't on y'r stock
275 in the Southern R. R. Ass'n, due 2d M'ch last, as per statement enclosed, which d'ft please honor.

I am, truly, yours JNO. L. KING, *Treas.*

If McComb is in Boston let me know, as I wish to telegraph him.

Southern Railroad Association, lessees of the Mississippi Central Railroad Company.

OFFICE OF THE TREASURER,
NEW YORK, *Aug't 2d*, 1869.

Rec'v'd from Mr. J. Bardwell six thousand six hundred and sixty-five dollars, the same being an assessment of five per cent. on his

subscription to the capital stock of the Southern R'road Association, this making sixty-five per cent. assessed and paid upon the stock of this corporation and due by the call March 2d.

Am't of call	$6,665 00
Int. to 2d Aug.	191 80
Am't of d'ft	$6,856 80

JOHN L. KING, *Treas.*

[Two-cent int. rev. stamp, cancelled.]

276 $6,856.80. NEW YORK, *July* 28, 1869.

Pay to the order of J. L. Worth, Esq., cash., six thousand eight hundred and fifty-six $\frac{80}{100}$ dollars and ch'g'e to ac't as advised this day.

JOHN L. KING, *Treas.*

J. Bardwell, Esq., care of F. Skinner & Co., Boston, Mass.

[Two-cent int. rev. stamp, cancelled.]

Int. 39. When were the certificates of stock in the Southern Railroad Association issued?

Ans. I think some time in the fall of 1870.

Int. 40. What voucher, if any, did the parties, subscribers, receive upon payment of their respective calls?

Ans. They got a receipt, a kind of stock receipt; installment receipt.

Int. 41. Do you remember, in the spring of 1869, being engaged in a speculation in Chicago and Rock Island stock?

277 Ans. I do.

Int. 42. Do you remember having conversations and interviews with Mr. Bardwell respecting that speculation which resulted in an agreement between you?

Ans. I do.

Int. 43. What was the amount of stock involved in that speculation, and what was the par value of that stock?

Ans. The market value of the stock, I think, was about $1,300,000. It was above par. The par value was a million.

Int. 44. And the number of shares was about what?

Ans. About ten thousand.

Int. 45. Was that operation conducted through a broker?

Ans. Yes, sir; it was conducted through a broker.

Int. 46. And who was the broker?

Ans. Smith, Randolph & Co.

Int. 47. Of New York?

Ans. Yes, sir.

Int. 48. What agreement did you make with Mr. Bardwell?

278 Ans. He was to have paid me $50,000 in cash.

Int. 49. For what purpose?

Ans. For margins, and receive one-fourth of the net profits after all the expenses were deducted.

Int. 50. The arrangement with the brokers was, I suppose, that they were to buy and carry the stock for a margin?

Ans. Yes, sir.

Int. 51. About what amount of margin was required for such a transaction?

Ans. Well, all of $200,000. It depended a good deal upon the market.

Int. 52. You had correspondence with Mr. Bardwell upon that subject, did you?

Ans. Yes, sir.

Int. 53. Had you any conversation with Mr. Snyder upon the subject?

Ans. Never a word, sir.

Int. 54. Did you have any correspondence with him in any shape upon the subject?

Ans. Never a word, sir.

279 Int. 55. (The letter of 21st of April, 1869, marked "U" for identification, is shown the witness.) Is that a letter which you received from Mr. Bardwell in the course of that transaction in Rock Island stock?

Ans. Yes, sir.

Int. 56. Is it in his handwriting?

Ans. It is.

Int. 57. Had he previously said anything to you as to the source from which he expected to draw money to invest as margin?

Mr. FOSTER: I object.

AMES, J.: Since hearing the opening of the case the connection of Mr. Bardwell with these transactions has looked more close and intimate than I suppose it was. I am inclined to think that it would be more convenient that all these papers should come in, subject to all objections.

Mr. RUSSELL: That is admitted *de bene?*

AMES, J.: Yes, sir; the papers are admitted conditionally, subject to my rulings on their competency.

Mr. RUSSELL: That is, after the evidence closes your honor will make a ruling?

AMES, J.: Yes, sir.

280 Mr. FOSTER: The objection was to the question addressed to the witness relative to the conversation with Mr. Bardwell.

Mr. BANGS: I do not offer the testimony for the purpose of showing that Mr. Snyder was or was not interested, but for the purpose of showing Mr. McComb's information on the subject.

AMES, J.: I have so much doubt about the competency of Bardwell's declarations that I must exclude it.

(Plaintiff excepted.)

Mr. BANGS: I now offer the letter of April 21, 1869 (Exhibit U, J. M. W. Y.).

(Admitted *de bene*, subject to exception by the plaintiff.)

U, J. M. W. Y.

BOSTON, *Ap'l 21st*, 1869.

MY DEAR MCCOMB: I rec'd yours this morning and answered by tel. that I would write you—having been away yesterday to pay the margin on "C. & R. I." I depended on $40,000 wh- was to have been p'd in on a mortgage on or before the 1st of April, wh-
281 has not come in, but wh- I feel sure I shall get next week at latest. I have had a hard 4-weeks sickness, heavy pay'ts, dull trade &c., &c., and I got behind, but I now feel like myself once more, and shall "plumb my line" in next 10 days, when nothing unfor-seen occurring, "Richard will be himself again." Arrange, if you can, for me for a few days, when I will respond. I will write you to-morrow about the U. P. R. R. meeting. I am not sure whether I shall go into the Ghidden plan or not; it will depend somewhat upon what course the stockholders take as to board of directors, &c. You will be glad to know that I have to-day consummated a settlement with the Vassalboro & James Mills Companies; these things have been on the slate one 7 years the other 7 mos. One by one I am bound to resolve my matters so that I can have an hour's breathing spell.

Yours truly, J. BARDWELL.

Int. 58. Were you here yesterday during the evidence of Mr. Strang, Mr. Snyder's partner?

Ans. Yes, sir.

Int. 59. And you saw the drafts yesterday drawn by Bard-
282 well on Strang & Snyder and bearing your endorsement?

Ans. I did.

Int. 60. And you also saw the receipt signed by yourself dated the 22d April?

Ans. I did.

Int. 61. Do you remember where you signed that receipt?

Ans. I do not.

Int. 62. Were you or not aware, before Mr. Strang testified to the fact yesterday, that those acceptances were not drawn against funds of Bardwell?

Ans. No, sir.

Int. 63. Had you any knowledge or information as to the account or consideration upon which they were drawn or accepted other than appeared on the face of the acceptances?

Ans. Not any whatever.

Int. 64. What did you do with those acceptances?

Ans. Handed them to Smith, Randolph & Co.

Int. 65. And then what became of them?

Ans. They went to their Philadelphia house to be discounted and the proceeds to be remitted to them. I endorsed them and
283 had them discounted on my own bank account in the Bank of North America, at Philadelphia, and a check for the net proceeds remitted Smith, Randolph & Co. at New York.

Int. 66. Can you state what the net proceeds were?

Ans. To the best of my recollection they were $44,709.38.

Int. 67. Will you look at this document now shown you (dated 6th May, 1869) and state if that is a report to you of the proceeds?

Ans. This is an acknowledgement of the proceeds being received by Smith, Randolph & Co. for the credit of my account:

(Paper marked "9, J. M. W. Y.")

9, J. M. W. Y.

Smith, Randolph & Co., bankers.

NEW YORK, 6 *May*, 1869.

H. S. McComb, Esq., Wilmington, Del.

DEAR SIR: We have your favor of 5th inst., and note contents. Below we give statement of entries to your account this day.

Debits.	Credits.
	Remittance ---------- 44,709 38

Yours truly, SMITH, RANDOLPH & CO.

284 Int. 68. From you?

Ans. From me.

Int. 69. About when was that speculation in Rock Island wound up?

Ans. I think it was finally wound up in September, 1869.

Int. 70. Had you in the meantime made any remittances to Mr. Bardwell?

Ans. I had made settlements with him.

Int. 71. Had you in the meantime made remittances which were subsequently taken into account in your settlement?

Ans. Yes, sir.

Int. 72. Look at the two checks now shown you, and which bear your signature and Bardwell's endorsement, and state if they constitute a part of these remittances.

Ans. I think they do, sir.

Int. 73. That is, do they constitute a part of the remittances which were taken into account in the final settlement of the transactions?

Ans. Yes, sir; I think they do.

(Checks read and marked "10, J. M. W. Y.")

285 J, J. M. W. Y.

BOSTON, *July 30th*, 1874.

Col. H. S. McComb.

DEAR SIR,—For a consideration, I have assigned the receipt I hold from you, as trustee, to Leland, Allen & Bates. I was sorry to be obliged to do this, as it will affect your friend Bardwell's interest in the contemplated profits, but, as I was obliged to do something to raise money, I done the best I could.

Yours respectfully, C. B. SNYDER.

10, J. M. W. Y.

No. 727. PHILADELPHIA, *Aug.* 6, 1869.

The Bank of North America pay to Josiah Bardwell or order twenty-five hundred dollars.

$2,500. H. S. McCOMB.

Endorsed by J. Bardwell.

286 10½, J. M. W. Y.

No. 736. NEW YORK, *Sept.* 23, 1869.

The National Park Bank of New York pay to the order of Josiah Bardwell two thousand dollars.

$2,000. H. S. McCOMB.

Endorsed by J. Bardwell.

Int. 74. There was given in evidence a letter marked "T," from Bardwell to you, dated Sept. 17, 1869, in which he says, "I have yours (without date) advising balance due," etc. Have you the letter there referred to?

Ans. I have.

Int. 75. Is the paper now shown you a copy?

Ans. I should think it was, but I have a press copy here.

Int. 76. This is made from a press copy.

Ans. That is what I understand, but I never compared it.

(Letter from Col. McComb to Mr. Bardwell, dated Sept. 15, 1871, read and marked "11, J. M. W. Y.")

287 11, J. M. W. Y.

MY DEAR FRIEND BARDWELL: I had sent the note for our joint canal int. before getting your despatch yesterday morning, and suppose it reached you all right and in season.

I shall not go to Boston this week. I have had no notice of a meeting of trustees, and unless the people are ready to act I can see no good reason for losing the time necessary for such a trip. I am going ahead with my suit *vs.* Credit M., & sundry individuals, and mean no delay short of a settlement.

The nett of your account is	$36,719 80
From which deduct payment of	2,500 00
Leaving due you, and subject to call	$34,219 89

Shall I pay your trustee call S. R. R. A. due the 20th, inst.?

Ever yours, H. S. McCOMB.

Sept. 15, 1869.

Josiah Bardwell, Esq.

Int. 77. The original letter was in your own handwriting, was it?

288 Ans. Yes, sir.

Int. 78. Have you a copy of the account, if there was one, which was enclosed in that letter?

Ans. I have not, sir.

Int. 79. Did the account cover this transaction in Rock Island stock?

Ans. The account covered the whole Rock Island transaction.

Int. 80. All your receipts and payments on that account?

Ans. Yes, sir.

Int. 81. Had you, prior to the writing of that letter and the signing of that account, made any, and what, large remittances or drafts in favor of Bardwell?

Ans. On the 4th of August, 1869, or about that time, I gave Bardwell a draft for $44,709 on Smith, Randolph & Co., New York.

(By Mr. FOSTER:)

Int. 82. Any cents?

Ans. No, sir.

(By Mr. STOREY:)

Int. 83. Is there any memorandum of that draft to which you can refer?

Ans. There is with Smith, Randolph & Co., I suppose.

289 Int. 84. Have you none on your books?

Ans. No, sir.

Int. 85. So as to determine the question whether there were any cents or not?

Ans. I think not; none to my recollection about it.

(By Mr. BANGS:)

Int. 86. You were here this morning when Mr. Fiske was examined, were you not?

Ans. I was.

Int. 87. Will you look at the paper, "No. 8," which he produced and state if you recognize the handwriting?

Ans. I recognize this as the handwriting of Mr. Dexter.

Int. 88. And who was he?

Ans. This gentleman here.

Int. 89. What relation had he to Mr. Bardwell?

Ans. He was confidential clerk in F. Skinner & Co.'s, as I understand it, for Mr. Bardwell.

Int. 90. Is there anything on that memorandum which aids your recollection?

Ans. Not particularly.

Int. 91. Does it correspond with your recollection?

Ans. All except the cents in that top item.

(By Mr. STOREY:)

Int. 92. What was the difference?

290 Ans. Thirty-eight cents.

Mr. BANGS: Wait a moment. I must ask you to pay at-

tention to my question, because these gentlemen are not on the same side.

Int. 93. Up to September, 1869, had you any information, other than that contained in Bardwell's letter of the 17th of September (which has been read in evidence), as to Snyder's being interested in the Rock Island transaction?

Ans. None whatever.

Int. 94. Do you remember being in Boston soon after the letters of the 15th and 17th of September?

Ans. I was in Boston between the 21st and the 30th of September, 1869.

Int. 95. Had you at that time any interviews with Mr. Bardwell and Mr. Snyder upon the subject of the Rock Island stock?

Ans. None on the subject of the Rock Island stock. I had on the subject of other stock.

Int. 96. Will you state what Mr. Bardwell said to you in Mr. Snyder's presence, if anything, upon the subject of Bardwell's
291 relation to him, growing out of their previous financial transactions?

Ans. Mr. Bardwell told me that Mr. Snyder had given him some money from a mortgage, and that he wanted to transfer to him, subject to the arrangement that was made between Bardwell and myself, the trsutee stock as security. Mr. Snyder came up while Mr. Bardwell and I were talking.

Mr. FOSTER: Stop one moment.

AMES, J.: The inquiry was, What was said in Snyder's presence? and you say Mr. Bardwell had been telling you something about having some money and wanting to transfer stock.

Mr. BANGS: If that was not in Mr. Snyder's presence I did not call for it.

The WITNESS: Which?

Mr. BANGS: What you have just stated.

The WITNESS: It was in Mr. Snyder's presence.

AMES, J.: You said he came up afterwards.

The WITNESS: It was in reference to the whole thing.

AMES, J.: The whole was in Mr. Snyder's presence?

The WITNESS: Yes, sir.

Mr. FOSTER: Both before he came up and after?

The WITNESS: Both if you wish.

292 Mr. BANGS: Well, go on, Mr. McComb.

The WITNESS: I have answered your question.

Int. 97. You said Snyder came up and said something. What did he say?

Ans. He asked me if Bardwell had fixed that matter.

Int. 98. Did you make any arrangement or agreement at that time with Bardwell and Snyder or either of them (I don't ask you what the arrangement was, but did you make any arrangement with Bardwell or Snyder); and, if so, with which of them?

Ans. I agreed.

Int. 99. I don't ask you what you agreed. I ask you whether

you made any arrangement with Bardwell or Snyder. I distinctly asked you whether you made it with either and which of them.

Ans. I made an arrangement with Bardwell.

Mr. FOSTER: I object unless made in Snyder's presence.

AMES, J.: I think he may show it.

(Plaintiff excepted.)

Ans. The arrangement made with Mr. Bardwell was that
293 some acknowledgement should be made of this stock standing in my name as trustee.

Int. 100. Can you tell exactly what each party said in making this arrangement?

Ans. I cannot. I am giving the substance. Mr. Bardwell remarked to me that he had gotten money from Snyder and he wanted to give him an interest in this Southern Railroad Association stock and wanted from me a paper to that effect, he pledging himself that he would make good to me whatever difference it made in his transaction with me. That is about the substance of it.

Int. 101. Where was Snyder's place of business at that time?

Ans. His establishment was in the third floor of 69 Franklin street.

Int. 102. Where was Skinner's?

Ans. On the second floor of 69 Franklin street.

Int. 103. Can you say how intimate and frequent was the intercourse between Snyder and Bardwell?

Ans. I cannot.

Int. 104. While they were under your observation?

Ans. Well, Mr. Snyder came down into Mr. Skinner's office
294 quite frequently. I saw him there when I was in Boston; perhaps once, perhaps oftener. He would walk into the office, walk around, and walk out again—say something to one of the clerks sometimes or to Mr. Cutter, and sometimes to Mr. Bardwell.

Int. 104½. Was there conversation between him and Bardwell in which you did not participate?

Ans. I have no doubt there was.

Int. 105. In April and May, 1869, and down to September what was the credit and standing of F. Skinner & Co. and Mr. Bardwell?

Ans. F. Skinner & Co. in the spring of 1869 stood very high; F. Skinner & Co. in the fall of 1869 did not stand anywhere. I think they failed in November or December, 1869.

Int. 106. In the spring of 1869 how was their paper?

Ans. I should have taken it—did take it—largely.

Int. 107. What was the market for it?

Ans. I think it stood very high. I took it without hesitency.

Int. 108. And without inquiry?

Ans. And without inquiry—$50,000 at a time.

295 Int. 109. In September, 1869, at the time when you had this conversation with Mr. Bardwell, in which he said he was in debt to Snyder, did Mr. Bardwell make any reference to the indebtedness having arisen on these acceptances of Strang & Snyder?

Ans. Not a word, sir.

Int. 110. When did that fact first come to your knowledge that any indebtedness originated in that way?

Ans. When I heard Mr. Snyder yesterday on the stand here.

Int. 111. In September, 1869, what information had you as to the standing and solvency of F. Skinner & Co.?

Ans. I think it was shaky then a little, sir. I think they had made losses, or were about making a loss, with a man named Barry.

Int. 112. Were you informed of that?

Ans. Yes, sir.

Int. 113. Do you know of any arrangement having been made with F. Skinner & Co. or Bardwell as to their indebtedness
296 some time in 1869? Did Bardwell transfer something to you?

Answer. Not in September, 1869.

Int. 114. What about 1,333 shares?

Ans. That was in November, I think.

Int. 115. See if that is a letter you received from Mr. Bardwell in November, 1869?

Ans. Yes; this is a letter I received from Mr. Cutter. That is Mr. Cutter's writing—signed "Bardwell, by Cutter."

Int. 116. Mr. Cutter is now present, is he?

Ans. Yes, sir.

Mr. FOSTER: We object to that letter as wholly immaterial to this investigation.

Int. 117. Was there anything came with it?

Ans. There was a power of attorney referred to to transfer to myself or any other person I chose 1,333 shares of the stock of the Southern Railroad Association.

Int. 118. Did you act on that power of attorney and transfer the shares?

Ans. I think so. I had loaned $60,000 on it a few days before.

Mr. BANGS: I offer the letter.

297 AMES, J.: The connection is not very obvious to me, but I am inclined to think it is a little easier to let all this correspondence in and select out of it what is competent as well as I can.

Int. 119. Did that transfer any other consideration than his indebtedness to you—that is, did you give anything for it?

Ans. I gave $60,000.

Int. 120. Not at that moment?

Ans. I had given it before that was made.

(Letter of November, 1869, read and marked "12, J. M. W. Y.")

12, J. M. W. Y.

BOSTON, *Nov.* 18, 1869.

H. S. McComb, Esq.

DEAR SIR: Enclosed is power of att'y to transfer 1,333 shares of Southern R. R'd Association.

Yours truly,

J. BARDWELL,
Per CUTTER, *E. F. C.*

J. B. will probably write you later in the day.

298 Int. 121. Look at that letter and state, if you can, in whose handwriting it is.

Ans. Yes, sir; that is a note in pencil, written by Mr. Bardwell to me.

(Paper dated Oct. 13, 1869, read and marked "13, J. M. W. Y.")

13, J. M. W. Y.

PARKER HOUSE, 3 O'CLOCK, *Oct.* 13, 1869.

MY DEAR MCCOMB: You and the Dr. come to No. 8. I have dinner waiting.

Truly,

J. BARDWELL.

I want to — back to Franklin St. at 4 o'clock.

J. B.

Int. 122. Where did you receive that letter? Was it Wilmington, New York, or Boston?

A. I received it in Boston.

Int. 123. You were, then, here on Oct. 13, 1869?

Ans. I was here.

299 Int. 124. During your presence here on that occasion did you have any conversation with Bardwell or Snyder about this transfer?

Ans. None whatever, sir.

(Letter from Mr. Bardwell to Col. McComb, dated Boston, Sept. 30, 1869, read and marked "14, J. M. W. Y.;" also letter from the same to the same, dated Oct. 5, 1869, read and marked "15, J. M. W. Y.")

14, J. M. W. Y.

BOSTON, *Sept.* 30, 1869.

MY DEAR MCCOMB: I was at Newburyport yesterday afternoon, and did not get your tel. until this morning. Barry tel. at same time for us not to use $80,000 of his d'fts on Philadelphia, and this draws us short here and in N. O. for the week, and this is not all, I promised Bates to pay $35,000 to-morrow to the U. P. R. R. and again $70,000 which I should have received yesterday in New York from my auction sale; will not be paid until next week, so I could

not turn the corner as I ought to have been able to have done with a decent balance. Again Strang advised me that he had the promise of a $40,000 discount to-day. I sent him $60,000 Washington Mills paper, 70 days to run, he telegraphed at 12 o'clock; bank has broken its promise, so with all I must have another 24 hours to turn.

300

I do not know the fact, but I think matters will be no worse next week, yet I don't like these times.

Yours always, J. BARDWELL.

15, J. M. W. Y.

(Personal.)

BOSTON, *Oct.* 5, 1869.

MY DEAR FRIEND MCCOMB: I am in trouble, and first to you I write. I left here Saturday night for New York, and returned Sunday night; since Sunday I have not closed my eyes. I have been duped and swindled by that man Barry, and it is my own fault that makes the matter so much the worse. I had his honor pledged to me, and were credulous enough to believe. Since Sept. 23, I have paid $260,000 for him. From a sick bed he came to see me in New York Sunday when my first fears were realized, he owned that he had lost $120,000 in stocks. After talking with him six hours I left, feeling disgusted and tired. I only fear now that I do not know the worst, he owes me $700,000 and I fear he has misapplied or used some $150,000 of acceptances, he said he had them on hand unused, but I have reason to think otherwise, when he told me that there were no more drafts on us, and that as it stood Friday, so it was and no more. I came home to find his drafts for $35,000 drawn on Saturday, these of mine have gone back. The sufferings of hell cannot compare but unfavorably with mine, but I won't write more.

301

Yours always, J. BARDWELL.

Don't say a word about this to any one.

Int. 125. Now, I call your attention to your letter of Nov. 22, 1869, which is Exhibit C, introduced in evidence yesterday. (Letter read; printed at page 86, folio 257.) You say, "After the receipt of your letter." Is the letter which I now show you the one to which you refer?

Ans. Yes, sir; that is the letter referred to as being answered by me on the 22d.

Int. 126. Did you receive any other letter than that from Bardwell on the subject of giving an acknowledgment?

Ans. None at all.

Int. 127. Did you ever hear, before you heard Mr. Snyder testify yesterday, that any other letter had been written?

302

Ans. Never, sir.

Int. 128. This letter, to which yours is an answer, is in whose handwriting?

Ans. Josiah Bardwell's. (Exhibit W, letter dated Nov. 12, 1869, read; printed at page 97, folio 290.)

Int. 129. Had you any consideration or inducement for the signing of the trust certificate, which now bears date the 23d of November, 1869, other than the correspondence and conversation and transaction which you have just stated?

Ans. No, sir.

Int. 130. Had you or not any money of Mr. Snyder's in your hands?

Ans. No, sir.

Int. 131. Had you or not ever solicited him to become a stockholder in the Southern Railroad Association?

Ans. I never did.

Int. 132. Had you ever made any representations to him,
303 with a view to getting him to subscribe, concerning its value or prospects?

Ans. None whatever.

Int. 133. Have you ever requested him, in any form of words, to permit you to invest for him in stock of the Southern Railroad Association any of the money which had been placed in the hands of Smith, Randolph & Co.?

Ans. Never a word.

Int. 134. Did any money of his come into your hands?

Ans. There was nothing in my hands.

Int. 135. Was there at any time after July or August, 1869, and down to November, 1869, any unsubscribed stock of the Southern Railroad Association?

Ans. Not a share of the Southern Railroad Association.

Int. 136. To what stock did your conversation with Bardwell, in Boston, running through the fall of 1869, relate—a new subscription or otherwise?

Ans. They related to that which stood in my name, H. S. McComb, trustee, and none other.

Int. 137. Your so-called certificate of trust says, "Upon which seventy per cent. has been paid." What payment does that expression refer to?

Ans. To the payments made by Mr. Bardwell, his note of
304 $37,580, and acceptances, I think, of $4,100.

Int. 138. Had you paid anything?

Ans. No, sir.

Int. 139. Had Snyder, as far as you know or were informed?

Ans. Snyder's name never appeared on the books of the Southern Railroad Association at all.

Int. 140. That may be.

Ans. Well, sir, what is the question?

Int. 141. Had he ever paid any part of that sum, of about $42,000—that is, $37,580 and $4,100—as far as you knew or were informed?

Ans. Not at all. None, as far as I know.

Int. 142. The question embraces everybody. Had he paid anybody in the universe, so far as you knew or were informed, includ-

ing yourself, the Southern Railroad Association, and Bardwell, for calls on that stock?

A. None that I know of, except that I was informed in Bardwell's letter to me and by Bardwell in conversation, in which he said he had got money from him for which he made this transfer.

305 Int. 143, '4. Your letter of the 22d November, 1869, which I have read to you, uses this expression: "If it is not in conformity with your wishes in any manner, please return it to me with such instructions to be carried out as you see- disposed to make." Did you receive any answer to that request?

Ans. Never.

Int. 145. Did he at any time say anything, in effect or in terms, that it was not in conformity with his wishes?

Ans. Never.

Int. 146. Did he ever return it to you?

Ans. Never.

Int. 147. Did he ever give you any instructions to be carried out concerning it?

Ans. Never.

Int. 148. Have you ever seen it since?

Ans. Never; until I saw it produced at the trial in New York. I saw that something had been added to it yesterday from what was on it in New York.

Int. 149. What was it?

Ans. The writing in ink was not there when I saw it in New York.

Int. 150. What was it?

306 Ans. It was in pencil; the "received" on top, in Bardwell's handwriting was not there when I saw it in New York. That had been put on since.

Int. 151. There was a pencil memorandum?

Ans. Yes, sir; a pencil memorandum. I called attention to it at the time.

Int. 152. Although you had not seen it down to the time when you were examined in New York, you had in the mean time seen Mr. Snyder, had you not, between November, 1869, when you sent this certificate to Bardwell, and November, 1875, when the certificate was shown you in your examination in New York?

Ans. A great many times.

Int. 153. And upon the subject of the stock?

Ans. I had seen it once or twice upon the subject of the stock.

Int. 154. And a great many times upon other matters?

Ans. Yes, sir; I had met him.

Int. 155. You had transacted no business with him?

Ans. No, sir.

Int. 156. Although you had on some occasions conversed with him about this stock?

307 Ans. Yes, sir; once or twice.

Int. 157. Yet during that period he never produced the certificate to you?

Ans. He never produced it to me.

Int. 158. Did he ever tell you that it was not in conformity with his wishes?

Ans. He never told me that he had it.

Int. 159. A letter from him to you has been produced, dated the 3d of June, 1874, marked "E," which I now show you. Did you at the same time receive a letter from Mr. Bardwell?

A. Yes, sir.

Int. 160. Have you looked for the original of that Bardwell letter?

Ans. Yes, sir.

Int. 161. Can you find it?

Ans. I did have it, and gave it to my clerk to make a copy.

Int. 162. Have you recently looked for it?

Ans. I have recently looked for it.

Int. 163. Can you find it?

308 Ans. I have not been able to; it has been shoved about from one place to another.

Int. 164. Can yon produce a copy?

Ans. I can, sir. This is a copy in the handwriting of my clerk.

Mr. FOSTER: All this evidence comes in under the general objection. The objection is to the materiality of the evidence, not to the competency of the copy.

(Letter read from Mr. Bardwell to Col. McComb, dated Boston, June 3, 1874, and marked "16, J. M. W. Y.")

16, J. M. W. Y.

BOSTON, *June* 3, 1874.

MY DEAR MCCOMB: I expected to hear from you this morning on the Snyder matter. I enclose memo. of agreement, S. R. R. Ass'n, this will show the understanding as it is.

Mr. Snyder needs 30,000 to 35,000 in some way to help him out, and if he gets in bonds or otherwise, that which will help him over for 60 or 90 days, his interest as well as mine, will be served; as I may learn from you so shall I go to New York to-morrow or Friday, or not.

Please let me learn from [you, if you understand the en-

309 closed as I do, and if so, help me to relieve Snyder, as we talked when I was in New York.

Yours truly,

(Signed) J. BARDWELL.

Int. 165. What was that paper enclosed?

Ans. Mr. Bardwell's letter, of which that is a copy, and Mr. Snyder's letter of June 3, and the copy of the paper marked "To whom it may concern" all came to me in Mr. Snyder's envelope; at least all came to me in one envelope.

Int. 166. You did have, along in June and July, 1874, or there-

abouts, conversations with Snyder and Bardwell, together or separately, upon these subjects, didn't you?

Ans. I think some time in June; after this letter was written I met Mr. Snyder——

Int. 167. I want you to state the fact first whether you had a conversation with Snyder or Bardwell, either or both of them, upon that subject—just the naked fact.

Ans. I had conversations with Mr. Bardwell and I think one conversation with Mr. Snyder.

Int. 168. Can you tell how many conversations you had with Bardwell?

310 Ans. No; I cannot.

Int. 169. Do you think you can distinguish one from another exactly?

Ans. Not as to date.

Int. 170. You can't distinguish exactly as to what took place in one conversation and what took place in another, can you?

Ans. I could distinguish one particular conversation with Bardwell.

Int. 171. Can you recollect that?

Ans. I can recollect that.

Int. 172. Where did that take place, that conversation?

Ans. At the Brevoort House, in New York, in June, 1872; he stopped at the Windsor.

Int. 173. Whether or not Snyder was present then?

Ans. No, sir; Snyder was not present.

Int 174. Tell what you can as to the time and place of the interview you remember with Snyder.

Ans. I saw Snyder in the Southern railroad office, in New York, two or three times in 1874.

Int. 175. On this business, I mean?

311 Ans. He came in casually, with other people.

Int. 176. I am speaking of the time when you conversed about this business.

Ans. Just once in that time he spoke about that business.

Int. 177. Where was that?

Ans. In the office in New York.

Int. 178. Didn't you have some conversation with him at the Windsor hotel?

Ans. Yes, sir.

Int. 179. The one that Mr. Cross spoke about?

Ans. I don't remember of Mr. Cross being there.

Int. 180. You remember getting sick with smoking that evening, don't you?

Ans. I have not smoked a cigar for thirteen years—since 1854.

Int. 181. Cross was mistaken about that, then?

Ans. Yes, sir.

Int. 182. Through what period in 1874 did your communications with Snyder extend, including Leland, Allen & Bates?

Ans. I don't think I saw Mr. Snyder more than once or

312 twice between June, 1874, and the beginning of his suit in New York.

Int. 183. How long did your communications in any form with Bardwell on this subject continue?

Ans. Every time Bardwell was in New York, generally, I saw him, if I were there.

Int. 184. Did he speak about this business?

Ans. Yes, sir.

Int. 185. Frequently?

Ans. Frequently about my helping him, because in helping him I helped Snyder.

Int. 186. This letter of the third day of June, 1874, says: "I can get along with $30,000. What I want is for you to let me have the above amount, $30,000." You remember that?

Ans. I do.

Int. 187. Do you remember at one period a communication between you and a proposition involving the sum of $40,000?

Ans. They were varied.

Int. 188. Did that $40,000 proposition come from Snyder or Bardwell?

313 Ans. From Bardwell.

Int. 189. Do you remember at any time promising Mr. Snyder to do anything in the way of advancing him money or buying that stock or taking it off his hands in 1874?

Ans. I never promised him the stock; never knew that he had any connection with the stock, except what is stated in my letter to him; never.

Int. 190. Did you actually come to an agreement with Bardwell to do something if he made good the advances on the notes; did you agree to do something if he would do something?

Ans. I agreed to let him have $30,000 of Southern Railroad Association notes without my endorsement, he giving me collateral for these $30,000 notes, and his failure to give me the collateral prevented my giving him the notes.

Int. 191. Now tell us about that scheme that involved $40,000.

Ans. That was Bardwell's own figuring.

Int. 192. Well, what did he want?

Ans. He wanted me to give him their notes and wanted
314 two notes of about $5,000 each, with my endorsement.

Int. 193. Your own notes?

Ans. My own endorsement or my own notes.

Int. 194. That was in addition to the $30,000?

Ans. Yes, sir; all of which he guaranteed to take care of, but I had had a little experience with his guarantee and did not care to trust it any more.

Int. 195. What security did he speak of?

Ans. He mentioned a large interest he had in the New England Iron Company. Then I knew nothing about it. He said it was somewhere near Boston and was manufacturing bridges, I think. At the time I had never seen it.

Int. 196. Did Mr. Snyder make a proposition to you apart from that contained in the letter?

Ans. He never personally made a proposition to me for notes.

Int. 197. Did he ever ask you for money?

Ans. Never, sir.

Int. 198. Of course, if he did not, you did not promise it to him?

Ans. No, sir.

315 Int. 199. Now, I want you to look at the paper in pencil which I show you, together with Exhibit No. 18, produced by Mr. Fiske, and I would like to have you say whether or not you have ever seen either of them before.

Ans. That is not in Mr. Bardwell's writing and I never saw it.

Int. 200. It was among your papers, wasn't it?

Ans. No, sir; not among my papers. I never saw it before.

Mr. BANGS: Mr. Russell says the pencil memorandum is a memorandum made by him from another paper since the commencement of the trial; that he made from Mr. Fiske's Exhibit 18.

Int. 201. Now take No. 18.

Ans. That is not Mr. Bardwell's handwriting. I never saw it until to-day.

(Paper No. 18 was objected to by plaintiff and excluded.)

(Letter of Mr. Bardwell to Col. McComb dated June 24, 1874, read and marked "17, J. M. W. Y.;" also letter from the same to the same dated 27th November, 1874, read and marked "18, J. M. W. Y.;" also letter from the same to the same dated Dec. 6,

316 1874, read and marked "19, J. M. W. Y.")

17, J. M. W. Y.

THE WINDSOR,
NEW YORK, *June* 24, 1874.

MY DEAR GEN'L MCCOMB: I make transcript of memorandum for Snyder's benefit, undertaking to carry out myself the verbal agreement I made with you; 6 notes, $5,000 each, Southern R. R. Association 4 mos., and 2 for $5,000 each, your endorsement, you to have the $42,000 Snyder's as col. security, and I will send you the satisfactory papers. I think you will send them to my care for Snyder. I did not get to sleep until 5 o'clock this morning, my face troubled me.

Yours truly, J. B.

18, J. M. W. Y.

BOSTON, FRIDAY, *Nov.* 27, 1874.

MY DEAR MCCOMB: Thank God I am up and about again, and propose to keep so.

I wonder when I can see you, and where, is there nothing this way that requires your attention? The Snyder matter an-

317 noys me more than it can you. I should be glad to be relieved, also to put Snyder out of misery.

How about the canal property?

Truly, J. BARDWELL.

19, J. M. W. Y.

BEVERLY, SUNDAY, *Dec.* 6, 1874.

MY DEAR MCCOMB: Had you answered Tuesday for the S. R. R. Ass'n meeting, I should have gone to N. York to-morrow. On my own account I do not regret a later day, for I am coming so right in my health I don't want a set-back. I will be in N. York Thursday, nothing preventing. Snyder is anxious that I should go Tuesday, but what is the use.

Truly yours, J. BARDWELL.

Int. 202. Were you, in 1874, away from your residence at New York, in the South?

Ans. I think so.

Int. 203. Do you remember where you were and how long you were gone?

318 Ans. I think I was gone three or four times in the year; two weeks at one time and two months perhaps——

Int. 204. I mean between July and September or October.

Ans. I think I was gone about ten days or two weeks about the last October.

Int. 205. In 1874 what was the condition of the Southern Railroad Association financially?

Ans. Very good, sir.

Int. 206. How about its stock?

Ans. Its stock had considerably depreciated.

Int. 207. Was the Southern Railroad Association still maintaining an independent existence?

Ans. Not after the 1st of July, 1874.

Int. 208. What became of it?

Ans. It was merged in consolidation with another company; the property that it leased and run, from which it derived revenue.

Int. 209. How about its debts?

Ans. Its debts were assumed by the new company.

Int. 210. All its debts?

Ans. All its debts.

319 Int. 211. Then what was the value of the claims against it?

Ans. Par. Its debts were good, but its stock was very much depreciated.

Int. 212. Is it now in existence? Does it own any property?

Ans. It does not own any property.

Int. 213. What is the market value of its stock now?

Ans. Merely nominal.

Int. 214. How long has its value been merely nominal?

Ans. I think it has been nominal since July 1, 1874.

Int. 215. What happened to the road to affect the value of its stock?

Ans. The foreclosure and sale of the property.

Int. 216. Before that had there been any crevasses?

Ans. There had been two crevasses, which destroyed its property.

It cost nearly two millions. There was one break of the bank at Bonnet Carre that obstructed the road for nearly two months.

320 Direct examination of H. S. McComb resumed.

(By Mr. Bangs:)

Int. 217. Will you please state when you were first advised or when the idea came into your apprehension that this suit involved the question of the Rock Island transaction?

Ans. Only a few days since, sir.

Int. 218. Was it just before you left Wilmington to come here?

Ans. Yes, sir.

Int. 219. Did you make some search for the letters to you from Smith, Randolph & Co. at Wilmington?

Ans. Some little; yes, sir.

Int. 220. Rather a hurried search?

Ans. Yes, sir.

Int. 221. After getting to New York did you make any additional search?

Ans. I sent Mr. Calhoun to Mr. Randolph to give me anything he had touching the transaction in Rock Island.

Int. 222. When did you come to Boston this time?

Ans. I arrived in Boston on Tuesday night; I was only a few hours in New York.

Int. 223. You left New York on Tuesday morning?

Ans. I left Wilmington about one o'clock for New York,
321 and left New York at eight o'clock the next morning.

Int. 224. Now, will you look at the paper shown you and state if that was one of the letters which was handed you by Mr. Calhoun as having been received from Smith, Randolph & Co.?

Ans. Yes, sir.

Int. 225. Is it a letter actually written by you to Smith, Randolph & Co. in the course of the transaction?

Ans. Yes, sir.

Int. 226. Written at the time it bears date (Aug. 2, 1869)?

Ans. Yes, sir.

Mr. Foster: I object to that letter.

Ames, J.: I don't think he can use it except for the purpose of refreshing his recollection of any facts mentioned there.

Mr. Bangs: This is to prove what he did.

Ames, J.: He may testify what he did, but I doubt if his letters to his brokers are competent.

(Defendant excepted.)

Int. 227. Can you state whether or not you were in Boston on or about the 4th of August, 1869?

322 Ans. Yes, sir, I was; I arrived here on the 3d.

Int. 228. Does that letter aid your recollection in that respect?

Ans. Yes, sir, very materially; that letter is written from Newport, where I was stopping.

Int. 229. I now show you the cash book produced by Mr. Cutter, and call your attention to an entry upon it at page 143, under date Aug. 4, 1869; can you state what was the transaction there entered?

Ans. Yes, sir; I can state what that was.

Int. 230. What was it?

Ans. It was my draft in favor of Bardwell, returning the money which had been produced out of the drafts on Strang, Snyder & Co. used in the Rock Island account as margin; returning to him the money—the principal.

Cross-examination.

(By Mr. FOSTER:)

Cross-int. 1. Col. McComb, who was the originator of the Southern Railroad Association?

Ans. Well, I suppose I was, in part, with other gentlemen.

Cross-int. 2. Well, who first conceived the scheme?

Ans. Gen. A. M. West, of Mississippi.

323 Cross-int. 3. Is he one of the subscribers to the stock?

Ans. No, sir.

Cross-int. 4. In whose handwriting is that original paper that has been called a subscription paper?

Ans. I don't know; the attorney of the company, whoever that was.

Mr. BANGS: It is in the handwriting of a scrivener in my office.

Cross-int. 5. You, as you have testified, saw all the subscriptions made that day?

Ans. I saw all that have signed on that paper.

Cross-int. 6. Where were any other subscriptions that were made signed?

Ans. They were not signed on that paper.

Cross-int. 7. Were they signed anywhere?

Ans. I think not, sir; the money was paid and they got their stock.

Cross-int. 8. Was there any additional subscription besides what appears on this paper made by yourself?

Ans. None, sir.

324 Cross-int. 9. How much balance was left of the proposed subscription over and above the amount taken here? Do you remember?

Ans. There was not any when all the gentlemen who had agreed to take stock had got their subscriptions.

Cross-int. 10. No. After these gentlemen had signed how much of a balance was there?

Ans. I don't know; I didn't figure that up.

Cross-int. 11. From memory can you tell?

Ans. No, sir; not from memory. I think I figured it up yesterday here.

Cross-int. 12. If you figured it up yesterday don't you recollect?

Ans. I did not figure up the paper. I merely took off the numbers without making the additions.

Cross-int. 13. How much was taken by the gentlemen who did not sign?

Ans. My recollection is that Mr. Thomas C. Durant was to take $50,000 and Mr. Macy $25,000 or $30,000.

Cross-int. 14. And those two subscriptions with those written there exhausted the whole?

Ans. That is it, sir.

325 Cross-int. 15. Where are the books of the Southern Railroad Association now?

Ans. I don't know, sir.

Cross-int. 16. When did you last know where they were?

Ans. Severaly months since.

Cross-int. 17. Where were they when you last knew about them?

Ans. They were in my office.

Cross-int. 18. At Wilmington?

Ans. Yes, sir.

Cross-int. 19. What do you believe has become of them?

Ans. They were sent out to be stored somewhere.

Cross-int. 20. By you?

Ans. No, sir; I just ordered the papers boxed up and sent away, taken care of, without fixing any place.

Cross-int. 21. How long ago was that?

Ans. Several months since.

Cross-int. 22. During this year?

Ans. Yes, sir.

Cross-int. 23. Can you tell what month in the year?

326 Ans. No, sir; I have nothing to refresh my recollection about it.

Cross-int. 24. Do you know whether it was before or after last May?

Ans. No; I cannot tell.

Cross-int. 25. What is your best recollection on that subject?

Ans. I have no recollection about that particular thing, for there is nothing in it to make a memorandum in my mind.

Cross-int. 26. Do you know whether it was more or less than six months ago? Can you tell anything about it except that it has been done within a year?

Ans. I cannot; it has been done within a year.

Cross-int. 27. Whom did you direct to pack them up?

Ans. Some of my clerks.

Cross-int. 28. Which one?

Ans. I cannot recollect the exact one; it was a promiscious order given the boys, perhaps; they can still be reached.

Cross-int. 29. You have control over them?

Ans. I can get them; yes, sir.

327 Cross-int. 30. How long have they been at Wilmington?

Ans. Perhaps two years.

Cross-int. 31. They came there from New York?

Ans. Yes, sir.

Cross-int. 32. Sent there by you?

Ans. No, sir.

Cross-int. 33. Who sent them there?

Ans. The secretary of the company.

Cross-int. 34. What is his name?

Ans. William Calhoun.

Cross-int. 35. Is he one of your clerks and here as one of your witnesses?

Ans. No, sir; he never was one of my clerks.

Cross-int. 36. Is he here as one of your witnesses?

Ans. He is here as a witness in this case.

Cross-int. 37. Where does he reside?

Ans. He resides in New York, sir.

Cross-int 38. How long was he secretary of the company?

Ans. I think about five years; I think that long.

Cross-int. 39. Were they not sent to Wilmington by your direction?

328 Ans. They were not.

Cross-int. 40. They were sent to you there?

Ans. Yes, sir.

Cross-int. 41. What office did you hold in the company when it ceased to do business?

Ans. President.

Cross-int. 42. How long had you been president?

Ans. From about the beginning of 1871.

Cross-int. 43. What was the date of the incorporation?

Ans. 1869, sir.

Cross-int. 44. Will you send for the books of the Southern Railroad Association?

Ans. No, sir; I will not.

Cross-int. 45. You will not?

Ans. No, sir; I don't think you have any right to them, sir.

Cross-int. 46. You refuse to produce them?

Ans. I do, sir.

Cross-int. 47. You say you were present when Josiah Bardwell subscribed $100,000; were you then informed that he made

329 that subscription for the firm of Francis Skinner & Co.

Ans. I was, sir, by him.

Cross-int. 48. In his name, but for the firm?

Ans. Yes, sir.

Cross-int. 49. And do you, of your own knowledge, know that the assessments upon that $100,000 subscription were paid on or about the time that they were successively called for?

Ans. I think they were, sir.

Cross-int. 50. With promptness?

Ans. I think so. I was not the treasurer and cannot answer on that point.

Cross-int. 51. Were none of them paid so that you personally knew of it?

Ans. None of them at all that I personally knew of.

Cross-int. 52. Now, there is a subscription of H. S. McComb, trustee, for $60,000, as to which you testified this morning that you made it for Mr. Bardwell and that Mr. Bardwell said (see if I get your statement accurately) that you were to hold it as security for advances you had made and the balance for the benefit of
330 his wife. Have I stated it correctly?

Ans. I don't think you have stated it correctly. Will you have the kindness to have the notes read?

Cross-int. 53. Can't you answer the question?

Ans. I prefer to have the notes read.

Cross-int. 54. I prefer that you should answer and tell me now what was the arrangement made at the time.

Ans. The arrangement made at the time was this: It was subscribed for the benefit of his wife, and when the subscription was paid then it was to be held by me until such time as he could redeem it. That was the understanding when he made the subscription. There was no money paid at that time.

Cross-int. 55. When did he say anything about your holding it for your advances?

Ans. I think he said it about the time I endorsed the note.

Cross-int. 56. Not at the time the subscription was made?

Ans. Not at that time, for there were no advances made in 1868. There was nothing paid on the stock and it had no value.

331 Cross-int. 57. About the time you endorsed what note?

Ans. The note for $37,580.

Cross-int. 58. At that time he said you were to hold his stock as security for that note?

Ans. For that note and any other I had.

Cross-int. 59. What others were there?

Ans. There were debts due from him to me.

Cross-int. 60. What were they?

Ans. I don't just now remember; for advances of one kind and another.

Cross-int. 61. How much?

Ans. Well, just at that time, I suppose, there was, in addition to that $37,000 note, perhaps $10,000 or $15,000, in February, 1876—money advanced.

Cross-int. 62. February of what year?

Ans. February, 1869.

Cross-int. 63. Advanced for what?

Ans. For his own purposes.

Cross-int. 64. Can you tell when the advances were made and what they were?

Ans. Yes, sir; there was a balance of $8,000 that I had paid to Fisk & Belden on a speculation.

Cross-int. 65. Of yours or his?

332 Ans. Of his; I paid the money on the promise that he would redeem it.

Cross-int. 66. When was that payment made?

Ans. That was made in 1869, I think.

Cross-int. 67. Any others?

Ans. Yes, sir; he had five hundred shares of mine of Narragansett steamship stock, which cost me $50,000.

Cross-int. 68. When did he receive that?

Ans. He received that in the summer, I think, of 1869.

Cross-int. 69. When was the note dated?

Ans. The note was dated February 26, four months.

Cross-int. 70. And given in April?

Ans. Given February, sir.

Cross-int. 71. Given at the time it was dated?

Ans. Yes, sir; but not discounted by the bank at the time it was dated.

Cross-int. 72. When and where was the agreement made by which you were to hold as security for these things this stock?

Ans. I think that was made at some time in the early part of the spring of 1869?

Cross-int. 73. Where?

333 Ans. Whe-ver I signed that note.

Cross-int. 74. Where was that?

Ans. I don't know.

Cross-Q. 75. You don't remember?

Ans. No, sir.

Cross-int. 76. Now, won't you state, as accurately as you are able, the terms of that agreement?

Ans. I have already done it to you just now.

Cross-int. 77. You cannot state them more fully?

Ans. No; I think not.

Cross-int. 78. Were the amounts for which you were to hold the stock specified at that time?

Ans. No, sir.

Cross-int. 79. Was it specified that you were holding it as security for all future advances?

Ans. For anything he might owe.

Cross-int. 80. Anything that he did then owe or might afterwards owe?

Ans. Yes, sir.

Cross-int. 81. However much it might be?

Ans. To such an extent as I was willing to take it for.

334 Cross-Q. 82. To such an extent as you were willing to have him your debtor?

Ans. Yes, sir.

Cross int. 83. And the surplus over that was a trust for his wife?

Ans. Yes, sir; the whole thing was a trust for his wife if he discharged his debts to me and redeemed his stock.

Cross-int. 84. First came your claim upon it?

Ans. Yes, sir.

Cross-int. 85. Was there ever any writing setting forth that understanding?

Ans. Never, sir.

Cross-int. 86. In the summer of 1869 you gave him $50,000 of the Narragansett steamship stock?

Ans. Yes; I think it was in the summer of 1869.

Cross-int. 87. What did you give him that for?

Ans. To help him out.

Cross-int. 88. To raise money on?

Ans. Yes, sir; I took his note for it—F. Skinner & Co.'s note.

Cross-int. 89. Can you tell us what the date of the note was?

335 Ans. Yes, sir; I can.

Cross-int. 90. I wish you would.

Ans. I think I can tell you the date of the transaction by the notes. I took notes for it when I delivered him the stock.

Cross-int. 91. You feel confident that this note was given when it was dated—this $37,580 note?

Ans. Yes, sir; within a day or two of that date.

Cross-int. 92. What circumstances are there which enable you to fix the date?

Ans. None other than its date.

Cross-int. 93. Nothing but its date?

Ans. Nothing but its date.

Cross-int. 94. The cancellation of the stamps, as was agreed this morning, is two months later?

Ans. Very well, sir; that is the date it was discounted at the Park bank.

Cross-int. 95. This note being given in February it was given, was it not, on account of assessments overdue on this stock which you held?

Ans. Yes, sir.

Cross-int. 96. Now, when were those assessments payable?

336 Ans. Well, they were to have been paid when the subscription was made, six months before.

Cross-int. 97. They were in arrear?

Ans. Yes, sir.

Cross-int. 98. And had their payment been pressed?

Ans. Yes, sir; been asked for a great many times.

Cross-int. 99. If that was so, if the assessments were overdue and their payment had been pressed, how did it happen you did not get the note discounted as soon as it was made; do you remember?

Ans. Well, sir, the note was not mine; it belonged to the Southern Railroad Association.

Cross-int. 100. Did you pass it over to them directly?

Ans. Instantly, sir.

Cross-int. 101. It was in their possession from the 26th of February, 1869?

Ans. Yes, sir; my impression is that Mr. Bardwell gave it to them in their office.

Cross-int. 102. When did you endorse it?

Ans. Immediately.

337 Cross-int. 103. At that time?

Ans. Yes, sir.

Cross-int. 104. It passed out of your possession at that time. When did it come back into your possession?

Ans. It never came back into my possession. It was not my note.

Cross-int. 105. There had been no previous note, you testified.

Ans. Not that I know of.

Cross-int. 106. The assessment had stood as a matter of account.

Ans. Yes, sir.

Cross-int. 107. Did you not know that Mr. Bardwell was pushed for money between the time that he made this subscription and the time he gave this note?

Ans. I did not.

Cross-int. 108. Didn't you think that he was?

Ans. No, sir.

Cross-int. 109. Nothing led you to believe so?

Ans. Not that I remember now, sir.

338 Cross-int. 110. And when he told you, about the time or at the time this note was dated, that you were to hold his subscription for all past and future debts as well as the amount of this endorsement, did you then understand that he was pressed for money?

Ans. Not at all.

Cross-int. 111. Didn't suppose that he was?

Ans. No, sir.

Cross-int. 112. You thought he was entirely easy in his circumstances?

Ans. If I had not thought so I should not have taken his paper.

Cross-int. 113. Were you having in the meantime other transactions with Bardwell?

Ans. Yes, sir.

Cross-int. 114. Did he give you collateral for any advances that he made?

Ans. Yes, sir; he gave me collateral.

Cross-int. 115. What collateral?

Ans. 1,333 shares of Southern Railroad stock.

Cross-int. 116. When was that?

Ans. In 1869.

339 Cross-int. 117. I am now speaking of the period between the time when this subscription was made and the time this note was given.

Ans. I did not understand you to say that.

Cross-int. 118. Did you have any transactions with him between the date of the subscription in 1868 and the date of the giving of this note?

Ans. Yes, sir.

Cross-int. 119. Did you take collateral in such transactions with him?

Ans. No, sir.

Cross-int. 120. Was he at any time a creditor or was he always your debtor?

Ans. He never was my creditor in the whole history of his life, to the best of my knowledge.

Cross-int. 121. Was the firm of Francis Skinner & Co. ever your creditor?

Ans. Very largely during the war.

Cross-int. 122. During the years '68 and '9 were they?

Ans. I think not.

Cross-int. 123. During those years from '68 down they always owed you and not you them?

340 Ans. Yes, sir; that is my recollection.

Cross-int. 124. Did you ask for this security or did Mr. Bardwell voluntarily offer it?

Ans. He voluntarily offered it, it being in my name.

Cross-int. 125. It was his suggestion without any request from you?

Ans. Entirely so.

Cross-int. 126. Did he ask you to endorse the note?

Ans. No, sir.

Cross-int. 127. Did the association take the note without reference to your endorsement?

Ans. No, sir; it would have had to have my endorsement, because it was drawn to my order.

Cross-int. 128. He did not ask you to endorse it?

Ans. No, sir.

Cross-int. 129. Where was the note given, do you say?

Ans. In New York. I think so, sir.

Cross-int. 130. And you were present when it was given?

Ans. I think so, sir. I think it was given to me.

Cross-int. 131. Given to you personally?

Ans. I think it was given to me in the office of the South-

341 ern Railroad Association.

Cross-int. 132. And no words as to your endorsing it passed?

Ans. Nothing, except he gave it to me payable to my order as indemnification for the payments on that trustee stock.

Cross-int. 133. And you thereupon endorsed it and said you should hold the stock for everything past and future?

Ans. Yes, sir.

Cross-int. 134. What fixed the amount of this note? How was the amount of $37,580 arrived at?

Ans. That was made up by the treasurer of the company. They are not my figures.

Cross-int. 135. Did the assessments come to as much as that?

Ans. I did not figure it up.

Cross-int. 136. You don't know?

Ans. No, sir.

Cross-int. 137. Don't you know now whether the assessments were less than was paid on that stock?

Ans. No, sir.

342 Cross-int. 138. Have you made any examination to ascertain?

Ans. No, sir.

Cross-int. 139. Now, why was this stock originally put in the name of McComb as trustee if it was Bardwell's stock?

Ans. You will have to ask Mr. Bardwell for that, sir. The motive is with him, not me.

Cross-int. —. You don't know?

Ans. I know nothing about the motive except what I have stated.

Cross-int. 141. No motive was stated to you?

Ans. Nothing but what I have stated—that he thought it would be a good thing and when it was paid up and right he would give it to his wife.

Cross-int. 142. Was anything said about your interest in it at that time?

Ans. I had no interest in it.

Cross-int. 143. Nothing was said to you to the effect that you should have one?

Ans. No, sir.

343 Cross-int. 144. Now, you have testified in New York about this transaction, have you not?

Ans. I think so.

Cross-int. 145. Do you remember whether you gave the same account of it then as you are giving now?

Ans. Substantially so, I think.

Cross-int. 146. Didn't you there say that Mr. Bardwell had this stock put in your name without your knowledge or consent?

Mr. BANGS: I object.

AMES, J.: I think on cross-examination it is competent.

Mr. BANGS: His testimony is in writing and he is entitled to have the writing shown to him. That is our rule.

Mr. FOSTER: That is not the practice in this court.

Cross-int. 147, '8. Did you not in your testimony in New York say that Mr. Bardwell caused this $60,000 subscription to be put in your name without your knowledge or consent?

Ans. My counsel has already said that if I testified that I have a right to look at the paper.

344 AMES, J.: I think he has a right to ask your recollection about it.

Ans. My recollection is that I think I testified to his subscription by what the paper said. Then I had not examined it.

Cross-int. 149. What do you mean by that?

Ans. I mean by that that I testified to the best of my recollection that Bardwell had either subscribed my name without conferring with me or had asked me to do it.

Cross-int. 150. Is that what you stated?

Ans. I think that is what I stated. I have not read my testimony. I don't know what I said. That was two or three years ago.

Cross-int. 151. It was two or three years nearer to the date of the transaction, wasn't it?

Ans. Yes, sir.

Cross-int. 152. Was not your memory as good then with reference to the transaction as it is now?

Ans. If I had looked at it it would have been.

Cross-int. 153. Was not your memory of the transaction sufficient

two years ago to enable you to know whether this thing was
345 done by you in Bardwell's presence or something done by him in your absence that you afterwards heard of?

Ans. I have no positive recollection as to who signed that paper, and only have refreshed my memory by getting possession of that original paper, written within the last two or three months.

Cross-int. 154. Where has the original paper been since?

Ans. Been in the office of the company. It was in the archives of the company.

Cross-int. 155. "The archives of the company" for years, including the time when your testimony was given at New York, were where?

Ans. For two years or eighteen months they have been at Wilmington.

Cross-int. 156. At the time you testified in New York where were they?

Ans. They were in New York.

Cross-int. 157. And went afterwards to Wilmington?

Ans. Yes, sir; some time afterwards.

Cross-int. 158. Now, I understand you to say that you never
346 knew of Mr. Snyder's having any interest in the Rock Island speculation until what time?

Ans. Until after the receipt of Bardwell's letter of the 15th or 17th September, 1869.

Cross-int. 159. Did he then convey the information to you?

Ans. He conveyed it in the letter.

Cross-int. 160. Going back to your deposition in New York, in reply to a question by Mr. Bangs like this: "Do you know personally about Bardwell's transactions with the company unless you were personally present?" did you not answer "No, sir"?

Ans. I think it is probable I did, sir.

Cross-int. 161. Do you remember anything about it?

Ans. I think I should have answered that way now.

Cross-int. 162. Do you remember whether you did or not?

Ans. What?

Cross-int. 163. Do you remember whether you did or not at that time answer such a question in that manner?

Ans. I think I did, sir; I should do it now, sir.

Mr. FOSTER: It was not necessary for you to add that; it was enough for you to answer the question as put.

347 WITNESS: Excuse me.

Cross-int. 164. Then, did you not answer a question by Mr. Wilson to this effect, "How did that subscription, then, originally get into your name as trustee?" "Put so by Bardwell when he made the subscription." "With your consent?" "No, sir; I was not asked about it." "You subsequently assented to it?" "Yes, sir; that would indicate that." Did you answer in that way in reference to it?

Ans. I think I did.

Cross-int. 165. Shall we take it for granted that these were your answers at that time to the questions?

Ans. Yes, sir; I suppose you may.

Cross-int. 166. Now, after the Rock Island speculation had been partly realized, did you pay to F. Skinner & Co. the exact sum that you had received from the three drafts?

Ans. Yes, sir.

Cross int. 167. In September you made, did you not, a settlement of profits or an approximate settlement of profits?

Ans. I think so.

348 Cross-int. 168. Did you ever render a statement of the speculation showing accurately about it?

Ans. The statement of Smith, Randolph & Co. was given to Mr. Bardwell the day the draft was given, Aug. 4, 1869.

Cross-int. 169. The day the large draft was given?

Ans. Yes, sir; I had written to them to send the accounts here and I give them to Mr. Bardwell and left them.

Cross-int. 170. Now, on the 17th of September, 1869, Mr. Bardwell writes you, "My dear friend McComb, I have yours (of 15th) without date, advising balances, etc., due. Now, if it suits your convenience and pleasure it will be agreeable to me and to parties in interest to send me your acceptances, five months as per enclosed memorandum, — which I have added interest at the rate of 7% from Sept. 15th. With these I will settle with Snyder and parties in interest. When I see you I will tell you how I have settled with Snyder and others that you may agree with me that it is fair and right." Do you say that that reference to Mr. Snyder was the first information you had that he had any concern whatever in

349 the Rock Island operation?

Ans. I do, sir.

Cross-int. 171. You notice the form in which he refers to it?

Ans. I do, entirely.

Cross-int. 172. And was the first intimation that you had?

Ans. Yes, sir.

Cross-int. 173. "When I see you I will tell you how I have settled with Snyder and others that you may agree with me that it is fair and right."

Ans. Yes, sir.

Cross-int. 174. How could you agree with him that it was fair and right if you did not know anything about it?

Ans. That was one of his kind ways of putting things to get my approval.

Cross-int. 175. What interest had you in it if it was a private arrangement between him and Snyder?

Ans. Only a common interest with him, as being his friend and helping him.

350 Cross-int. 176. Did he want you to say that he had not defrauded himself?

Ans. He did that. He made settlements with other people about things which he called to my attention.

Cross-int. 177. You don't think that letter in its language recog-

nizes an interest on the part of Snyder and others in those profits which were to be divided, which you had previously known about?

Ans. I unhesitatingly say so—that I had never had any intimation from anybody else that Snyder had anything to do with it.

Cross-int. 178. Do you think that the letter indicates that you knew about it?

Ans. Yes, sir; I do.

Cross-int. 179. Then you think that the language of Bardwell's letter indicates something of that sort?

Ans. I didn't say so.

Cross-int. 180. I understood you to say so.

Ans. I didn't understand your question.

Cross-int. 181. Do you think that the language of that letter indicates that Bardwell was writing you about an interest of Snyder that you had known before?

Ans. I don't think that.

351 Cross-int. 182. You don't think it tends that way?

Ans. No, sir; it don't to my mind; it don't impress me that way.

Cross-int. 183. Where was the money that represented those profits at that time?

Ans. I presume it was in my hands or it would not have been drawn on me for.

Cross-int. 184. You know, don't you, whether you had it or not?

Ans. I certainly had it or I should not have paid the drafts.

Cross-int. 185. You would not have accepted them?

Ans. No, sir.

Cross-int. 186. When did you get the money?

Ans. I can't tell you when the final settlement of the transaction was made.

Cross-int. 187. You had got it, principal and interest, before the date of this letter, had you not?

Ans. I don't say that.

352 Cross-int. 188. Do you know whether you had or not?

Ans. No, sir; but I knew what it was.

Cross-int. 189. But you don't know whether you had received it from the brokers?

Ans. No, sir.

Cross-int. 190. Do you know when you received it from the brokers?

Ans. I don't.

Cross-int. 191. Will your books show?

Ans. I suppose they will; Randolph's books will show.

Cross-int. 192. Will yours show?

Ans. I presume they will; that I don't know, because it was a thing that did not go on my books; it belonged to other people.

Cross-int. 193. Was not this transaction which you were in entered on your books?

Ans. No, sir.

Cross-int. 194. No part of it?

Ans. No, sir.

Cross-int. 195. You entered those acceptances?

353 Ans. No, sir; only on the bill book.

Cross-int. 196. Didn't they go into your trial balance in any way?

Ans. No, sir.

Cross-int. 197. You entered the money you received from the brokers?

Ans. Entered it as cash.

Cross-int. 198. How did the rest of it stand?

Ans. It stood in the bill book. I have my bill book to show the acceptances.

Cross-int. 199. But if you received the money either before or after the date of those five notes didn't you enter that money somewhere?

Ans. Entered in the cash book.

Cross-int. 200. Will your cash book show when it was received?

Ans. I presume it will.

Cross-int. 201. Is it here?

Ans. No, sir.

Cross-int. 202. Are any of your books here?

Ans. No, sir.

354 Cross-int. 203. You came from Wilmington to attend this trial and left them at home?

Ans. I did not expect——

Cross-int. 204. I am not asking you what you expected. I am asking you whether you came on to attend this trial and left your books at home.

Ans. I have got my bill book and two letter books.

Cross-int. 205. Have your other books been inspected by your counsel in reference to the preparation of this case?

Ans. I don't think they ever have seen a book of mine.

Cross-int. 206. Now, don't you know that if you had any money in the hands of your brokers on the 17th of September at all events you were entitled at once to receive it?

Ans. I don't know about that.

Cross-int. 207. If the transactions had been settled and they had rendered their account as early as the 4th of August, don't you know that the balance which they had was then in their hands, payable to you?

355 Ans. If the stocks had been all sold for cash that would have been so, but if they had been sold on time it would not have been so.

Cross-int. 208. What was the longest time on which they could have been sold?

Ans. Sixty days.

Cross-int. 209. On the 4th of August you had a settlement?

Ans. I didn't say I had a settlement on the 4th of August.

Cross-int. 210. You had an account?

Ans. Yes, sir.

Cross-int. 211. You knew what the profits were?

Ans. I had the account from the brokers sent over to me, care of F. Skinner & Co., on the subject of the Rock Island account.

Cross int. 212. You had that account, so that you knew what the profits were?

Ans. No, sir.

Cross-int. 213. You didn't know?

Ans. No, sir; for if I had, the whole settlement would have
356 been made on the 4th of August instead of paying back the principal.

Cross-int. 214. You knew what they would be?

Ans. No, sir.

Cross-int. 215. What did the account cover?

Ans. I can't tell you. I gave it to those gentlemen.

Cross-int. 216. Have you ever received a cupplemental account from your brokers?

Ans. I have received an account from them.

Cross-int. 217. Have you ever received a supplemental account from the-?

Ans. Not in that precise form.

Cross-int. 218. Have you had any account from them since the account of the 4th of August that covers this transaction?

Ans. Yes, sir; my general account covers this transaction.

Cross-int. 219. Where is that?

Ans. Those are all in Wilmington.

Cross-int. 220. You did not bring that?

Ans. No, sir.

Cross-int. 221. You made an examination of their accounts before coming here?

357 Ans. I did not.

Cross-int. 222. Did you not say that you first learned that this transaction in Rock Island might be inquired into just before you left Wilmington?

Ans. Yes, sir.

Cross-int. 223. Did you look at their accounts there?

Ans. No, sir.

Cross-int. 224. What did you look at there?

Ans. I just asked my clerks to get up my letters.

Cross-int. 225. Not the accounts?

Ans. No, sir; and they got the letters, and I brought them.

Cross-int. 226. You would not claim, I suppose, that there was any balance coming from the Rock Island transaction that you were not entitled to receive as soon as sixty days from the 4th of August, would you?

Ans. I think not.

Cross-int. 227. It would all be covered by sixty days from that date?

Ans. I think so.

Cross-int. 228. Now, can you tell me why it was that those
358 five acceptances were made on five months from the 17th of September?

Ans. All I can tell you about that is that it was a freak of Mr. Bardwell's.

Cross-int. 229. Was it designed for your benefit?

Ans. I don't know.

Cross-int. 230. Were you short of money?

Ans. No, sir.

Cross-int. 231. You had an abundance of money?

Ans. I suppose I had enough to pay my debts.

Cross-int. 232. Was it worth seven per cent.?

Ans. I presume money is always worth that unless within the last year or two.

Cross-int. 233. Was the five months intended by Bardwell as an accommodation to you?

A. I can't tell what the motive was.

Cross-int. 234. You can't give any explanation of the five months' time allowed on this transaction. That must have been closed at least in October, except you say it was a freak of Bardwell's.

Ans. Yes, sir; that is all, sir. The notes were written out entirely by him and sent to me for acceptance.

359 Cross-int. 235. When you gave those notes you knew that they were given to enable Mr. Bardwell to settle the profits with Snyder and others, didn't you?

Ans. The letter gave me that information.

Cross-int. 236. Now, how soon after the 17th of September were you in Boston?

Ans. I think within two weeks.

Cross-int. 237. You have in your direct testimony spoken of how many interviews you had in 1869 at which Mr. Snyder was present?

Ans. Well, I think two; perhaps three.

Cross-int. 238. And what were the dates of those?

Ans. I don't recollect any date but the date of September, I think. I think that is the only time; but perhaps one in November.

Cross-int. 239. Do you think now that there was a third or only two?

Ans. I can't answer with certainty whether there were two or three.

Cross-int. 240. I was not putting the question to draw forth an absolutely certain answer, but what is your opinion about it?

Ans. My opinion is that I might have had two or three

360 interviews with Bardwell when Snyder was present.

Cross-int. 241. You remember two, but you don't remember three?

Ans. No; I don't very distinctly remember two; I remember one.

Cross-int. 242. You remember one distinctly, do you?

Ans. Yes, sir.

Cross-int. 243. What was the date of that?

Ans. I think that was in September.

Cross-int. 244. What time in September?

Ans. I think it was perhaps the 21st; I don't know; somewhere between the middle and last.

Cross-int. 245. It was after the date of this letter to you and the giving of those notes?

Ans. Yes, sir; that is my recollection.

Cross-int. 246. And after that time you had the interview which you say was in Snyder's presence, and Snyder came up, but it was all in his presence?

Ans. Yes, sir.

Cross-int. 247. Now, I will thank you to repeat what took place at that interview as fully as you can?

Ans. Well, sir, my recollection was that Snyder asked
361 Bardwell to have that stock matter fixed; something like that; that was about the substance of the language—that interest in the Southern Railroad Association—and Bardwell remarked to me that he had gotten some money from Snyder on a mortgage and he was going to give him his interest, subject to any claim in that stock, if I had no objections.

Cross-int. 248. Did he tell you how much money he had got from Snyder?

Ans. No, sir. I think he said about $40,000, as near as I can remember. I don't think now a dollar more.

Cross-int. 249. He said, subject to your claim?

Ans. Yes, sir.

Cross-int. 250. Was Mr. Snyder present when he made that remark or spoke of your claim?

Ans. I can't swear that Mr. Snyder was right present to hear every word that passed.

Cross-int. 251. Didn't you swear he was this morning?

Ans. I said that he came up.

Cross-int. 252. When your attention was called to something
362 that took place before he came up didn't you say he was there all the time?

Ans. I don't think I did.

Cross-int. 253. How will you have it now—that he was present during the whole of the conversation or part of it?

Ans. That he was present during the part of the conversation that I related.

Cross-int. 254. Will you have it that there was some part of the conversation at which he was not present?

Ans. Well, there was a long part of a conversation between Bardwell and myself at that same interview at which Mr. Snyder was not present. I was, perhaps, with Bardwell an hour or two, and Snyder was present less than five minutes.

Cross-int. 255. Was or was not Mr. Snyder present when Mr. Bardwell told you that he had got $40,000 of Snyder's money that came from a mortgage, and that he wanted to give him this Southern Railroad Association interest in your hands, subject to your claims?

Ans. He was present within hearing; he was as close to Bardwell and myself as that gentleman (*i. e.*, the reporter) is to *be*.

363 Cross-int. 256. Did you understand that he heard that?
Ans. I didn't ask him.
Cross-int. 257. Did you understand that he heard it?
Ans. I didn't ask him.

(By the COURT:)

Cross-int. 258. What did you think?
Ans. I didn't think anything about it. The remark was made there.

(By Mr. FOSTER:)

Cross-int. 259. Do you now have an opinion whether he heard it or did not hear it?
Ans. I have no opinion on that particular subject.
Cross-int. 260. Impression?
Ans. No, sir.
Cross-int. 261. Belief?
Ans. Belief? No, sir.
Cross-int. 262. Neither?
Ans. No, sir.
Cross-int. 263. Was there anything said during this conversation between you and Bardwell, either within the hearing of Mr. Snyder or without his hearing, of Mrs. Bardwell's interest in this stock?
364 Ans. Not a word then.
Cross-int. 264. Did you make any allusion to the fact that when you first took it you took it for her?
Ans. I did not, sir.
Cross-int. 265. Did you ever communicate it to her?
Ans. I did not.
Cross-int. 266. Is it true that you did so take it?
Ans. It is true. I took it, as Bardwell said.
Cross-int. 267. For her?
Ans. Yes, sir.
Cross-int. 268. But then you were ready to transfer it to Snyder, were you?
Ans. No, sir.
Cross-int. 269. What were you ready to do with it? When Bardwell's indebtedness was paid what did you agree with Mr. Snyder in September about that stock?
Ans. That I should hold that stock as it then was, the profits of it to go to Mr. Snyder until his $40,000 was returned, the principal of it always to remain with me until Bardwell's indebtedness to me was paid. That is all I remember.
365 Cross-int. 270. How were you going to separate the profits from the principal of the stock?
Ans. The same way that everybody does that—by the declaration of dividends.
Cross-int. 271. You were going to give the dividends, then, to Mr. Snyder, were you?

Ans. That is my understanding—that he would have a right to those.

Cross-int. 272. And then you were to hold the principal until you got back your money?

Ans. Whatever was due to me.

Cross-int. 273. Whatever was due to you or became due to you?

Ans. Yes, sir; whatever was due to me.

Cross-int. 274. Then you made an arrangement by which you subordinated Mrs. Bardwell's promised interest to a claim of $40,000?

Ans. I had nothing to do with Mrs. Bardwell. I never spoke to her on the subject. I was not her agent nor her communicant. I was not a go-between betwen Mr. and Mrs. Bardwell, husband and wife. I never did that business.

366 Cross-int. 275. Then you didn't regard it as a trust for her?

Ans. Only as far as Mr. Bardwell stated it.

Cross-int. 276. And you didn't think the statement made at the time you acquired your interest in it put you under any obligation to Mrs. Bardwell at all?

Ans. Not to her.

Cross-int. 277. You considered it proper to apply it to——

Ans. Anything Mr. Bardwell directed.

Cross-int. 278. After that arrangement with Snyder did you consider it was still held for future advances that you might make?

Ans. Yes, sir; subject to the original agreement that the profits went to Mr. Snyder.

Cross-int. 279. You have testified on this particular subject before, haven't you?

Ans. I think I did; very hurriedly.

Cross-int. 280. You testified under oath, I suppose?

Ans. Yes, sir.

Cross-int. 281. What was the hurried part of your testimony?

Ans. It was no examination of any papers connected

367 with the business.

Cross-int. 282. Are there any papers connected with this interview?

Ans. There is this agreement that has been presented here with my signature to it and there is this correspondence with Mr. Bardwell.

Cross-int. 283. Didn't you know about it at the time you testified?

Ans. I didn't until it was shown me by your client's attorney.

Cross-int. 284. It was shown to you at the time?

Ans. Yes, sir.

Cross-int. 285. Is there any other paper which you didn't have connected with this interview in 1869?

Ans. I didn't read any of the correspondence with Bardwell.

Cross-int. 286. Is there any correspondence which has been produced here which aids your recollection as to what took place at this interview in 1869?

Ans. Yes, sir.

Cross-int. 287. What is it?

Ans. The letter of Bardwell, November 12, 1869.

368 Cross-int. 288. That aids your recollection?

Ans. Yes, sir.

Cross-int. 289. When did you first see that?

Ans. I saw that letter within a few days after it was written.

Cross-int. 290. Now, what did you testify to in New York on the subject of Mr. Snyder's interest in this stock?

Ans. That, to the best of my recollection and belief, Mr. Snyder's interest consisted in the profits or a share of the profits; that the principal belonged to me for this debt of Bardwell's. That is, without having heard the paper read, my recollection of my testimony given three years ago.

Cross-int. 291. What did you then testify as to the interviews which you had with Snyder on the subject during the summer and autumn of 1869?

Ans. My recollection is that I testified that I had very few, if any.

Cross-int. 292. What did you testify as to what occurred at such interviews as you said you had?

Ans. I have forgotten that.

Cross-int. 293. You don't remember?

369 Ans. No, sir; you will have to read the document itself.

Cross-int. 294. (Reading from Col. McComb's testimony in New York:) "Do you remember having any interviews with him (Mr. Snyder) during the year 1869 on the subject of an investment or operation in the Southern Railroad Association? A. No, sir." Did you answer that?

Ans. I presume so; from my then recollection I answered that.

Cross-int. 295. "Q. Did you have any? A. I don't recollect."

Ans. Yes, sir.

Cross-int. 296. "Q. Did you have any during the years 1868, '69, or '70? A. I don't remember any interviews with Mr. Snyder specially; I have no means of fixing any particular date in either of those years of an interview with Mr. Snyder. Q. Would you be certain that you had none during those years? A. I would not.

Q. Do you remember any interview in the city of Boston

370 with Mr. Snyder on the subject of this Southern Railroad Association at which Mr. Josiah Bardwell was present? A. I have recollection of an interview with Mr. Snyder in the city of Boston, but I can't give any date, wherein Mr. Snyder merely alluded to some connection, through Bardwell, with the Southern Railroad Association." Do you remember that answer?

Ans. Yes; that was my then answer.

Cross-int. 297. Now, I want to know whether it is the interview in September, of which you have been testifying here, to which you referred when you said that Mr. Snyder merely alluded to something about the Southern Railroad Association.

Ans. I can't answer that.

Cross-int. 298. You know, don't you?

Ans. No, sir; you are asking me now, if I understand you, whether the interview I testified to in New York as being an inter-

view with Snyder here in Boston was the interview I am now testifying about.

Cross-int. 299. No; I am not.

371 Ans. Then I don't understand you.

Cross-int. 300. I am asking you whether the interview you have testified about to-day as taking place the latter part of September, 1869, between you, Snyder, and Bardwell is the same one that you referred to in that testimony when you said that Snyder merely alluded to something about the Southern Railroad Association.

Ans. I don't think I can answer that; I don't think I can say it was or was not.

Cross-int. 301. Do you say it was not?

Ans. I do not say so.

Cross-int. 302. Did you, at the time you testified in New York, remember about this interview in the latter part of September, 1869?

Ans. I recollected the interview, but I did not recollect any particular month; if I did, I would have stated it.

Cross-int. 303. Did you recollect the particulars of the interview?

Ans. Not particularly.

Cross-int 304. Did you mean to have it known in New

372 York that anything passed between you and Snyder in 1869 about this stock?

Ans. So far as I then knew—I hadn't examined anything connected with it.

Cross-int. 305. And all this interview you have given us to-day has sprung up in your memory since from examining the papers?

Ans. Yes, sir; from examining the original documents—not "sprung up to day;" sprung up since then.

(Reading:)

Cross-int. 306. "Wherein Mr. Snyder merely alluded to some connection, through Bardwell, with the Southern Railroad Association. Q. Can you fix that in any way by reference to the position of the enterprise at the time when you had that interview? A. There was nothing in the position of the enterprise that would warrant my fixing any given date. Q. I mean, can you remember what was the position of the enterprise at the time you had that interview? A. No, sir. Q. Do you remember that any interview between yourself and the plaintiff, in which the subject of his invest-

373 ing or becoming interested in any way in this Southern Railroad Association enterprise, took place in Boston? A. No, sir."

Mr. BANGS: There will be no dispute on our side that he testified to all that.

(Reading continued:)

"You don't remember, then, any conversation with Mr. Snyder, at which Mr. Bardwell was present, on the subject of Mr. Snyder's becoming interested in this association? A. I have already answered. Q. (continued). For the reason, I suppose, that that was a matter that you didn't consider yourself personally interested in?

A. I have already answered that question, and I doubt whether that suggestion of yours on that point is a proper one. If you will excuse me, I would like to have the judge rule on that, and I ask the stenographer to refer to the answer I gave before — that point. (The stenographer read the answer as follows:) 'I have recollection of an interview with Mr. Snyder in the city of Boston, but I can't give any date, wherein Mr. Snyder merely alluded to some connection,
374 through Bardwell, with the Southern Railroad Association.' The witness: I repeat that answer."

Then, your attention being called to the language of the receipt, this question was asked you:

"This letter indicates that you held it (the subscription) as a trustee for C. B. Snyder, does it not? A. I think I would rather that the court should make an interpretation of that. It refers there under an arrangement with Bardwell. You must take the whole thing together. I had no arrangement about it with Mr. Snyder at all. Q. You had no arrangement with Snyder about it? A. No, sir. Q. Then what does this sentence mean: 'This notice is in conformity with the arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself'? A. Merely a remark that Mr. Snyder made in my presence one day that he wanted Bardwell to fix that Southern Railroad Association. That was the substance of his remark. Q. Where was that remark made?
375 A. I think it was in Boston—in Skinner's office. Q. Do you remember when? A. No; I don't. Q. Was it in the year 1869? A. I could only suppose. Q. Well, what is your supposition? A. I presume it was. I suppose it was. Q. That is all the 'arrangement' that you know of? A. Yes, sir. Q. What did you understand that expression to mean? A. That he and Bardwell had had some figuring, and they wanted him to have some interest in the Southern Railroad Association stock. I knew nothing about what their arrangements were between themselves. Q. No explanation was given? A. No, sir."

Now, have you any explanation to make of the difference between your testimony to-day and your testimony in that examination or deposition except that your memory has been refreshed since?

Mr. BANGS: I object. That is an assumption of a difference.

AMES, J.: I think you should point out any discrepency.

376 Mr. STOREY: I think the difference is apparent. He says: "The language of the receipt referred merely to a remark that Mr. Snyder made that he wanted Bardwell to fix that Southern Railroad Association."

Mr. FOSTER: Passages from his deposition in New York have been read which we say are different and inconsistent with his testimony to-day. Now, I ask if he has any explanation to make of that difference.

Cross-int. 307. Do you understand to what I refer?

Ans. Will you please point out the different things—what I have said to-day and how that contrasts with it—and I will answer it.

Cross-int. 308. You heard these questions read?

Ans. I did, but I didn't hear the others.

Cross-int. 309. Is the account you gave of the interview when Snyder was present in the autumn of 1869 the same in that examination as just read to you as it was in your testimony this morning?

Mr. BANGS: I object. He has not testified to any interview in the autumn of 1869 in his New York deposition.

377 Cross-int. 310. Have you any explanation to give of the difference between these answers that have been read to you and your testimony this morning?

Mr. BANGS: I think that there is no difference in fact, and therefore he cannot be called on to explain it.

Cross-int. 311. Have you any explanation to make, whether a difference exists or not, of those answers that have been read to you?

AMES, J. (to witness): I think you should answer.

Ans. I will do anything the court directs. If you will read the questions put and answered in New York and then in juxtaposition with them let the answers to-day be read, if there is a discrepancy I will try to explain it.

Cross-int. 312. Don't you remember the account you gave this morning and the account you have given this afternoon of an interview the latter part of September, 1869, between yourself and Bardwell and Snyder?

Ans. Sufficiently to satisfy myself.

Cross-int. 313. Now, I want to know whether you regard
378 that statement as consistent with the statement just read to you from the deposition, in which you say that the words at the end of the trust receipt referred "merely to a remark that Mr. Snyder made in my presence one day that he wanted Bardwell to fix that Southern Railroad Association. That was the substance of his remark."

Ans. Now, with what does that conflict?

Cross-int. 314. Did he ever make such a remark to you?

Ans. That is my understanding.

Cross-int. 315. When was that remark made to you?

Ans. I said that I couldn't recollect. It was in the fall of 1869 when we were here.

Cross-int. 316. You have testified to two interviews in the fall of 1869?

Ans. I said one or two, I thought.

Cross-int. 317. Do you think it was at the interview the latter part of September?

Ans. I can't answer specifically as to that.

Cross-int. 318. What is your opinion about it?

Ans. I haven't any.

Cross-int. 319. Nor no recollection?

379 Ans. No, sir.

Cross-int. 320. You know that the interview you had in September was the first of the two or three you had, don't you?

Ans. No; I don't.

Cross-int. 321. What is your impression about that?

Ans. My impression is that the interview wherein Bardwell called the matter to my attention was in September.

Cross-int. 322. The interview you had in September was the first one you had on that subject when Snyder was present?

Ans. That is my recollection now.

Cross-int. 323. Was it in that interview that Snyder said that he wanted Bardwell to settle up that Southern Railroad Association matter?

Ans. I can't answer whether it was that one or not. I was here two weeks after that, the 12th of October.

Cross-int. 324. You have given a pretty full account of the interview the latter part of September.

Ans. I am glad you think so. I have tried to do so.

380 Cross-int. 325. Can't you tell whether that was the interview in which he merely made the remark in your presence that he wanted Bardwell to fix that Southern Railroad Association?

Ans. I don't think I can, sir.

Cross-int. 326. You cannot?

Ans. No, sir; the difference of two weeks would be rather rough when ten years have elapsed now.

Cross-int. 327. Is it true that the closing sentence of the receipt refers merely to a remark that Mr. Snyder made in your presence one day that he wanted Bardwell to fix that Southern Railroad Association?

Ans. I can't answer what Mr. Bardwell——

Cross-int. 327½. You signed the receipt, didn't you?

Ans. Exactly, but it is a copy of Mr. Bardwell's letter to me.

Cross-int. 328. A copy?

Ans. Substantially so; the letter of Nov. 12.

Cross-int. 329. At the end of this trust receipt there is this sentence: "This notice is in conformity with the arrangement

381 made some two months ago between Josiah Bardwell, C. B. Snyder, and myself." Now, being asked in your examination in New York to explain that sentence just read to you, you said it refers "merely to a remark that Mr. Snyder made in my presence one day that he wanted Bardwell to fix that Southern Railroad Association. That was the substance of his remark." Does that sentence refer merely to that?

Ans. You put one construction upon it and I put another. Am I to take your construction or mine?

Cross-int. 330. I ask you, is it true?

Ans. I am answering you that the testimony I gave in New York was as I then understood it.

Cross-int. 331. Is it true that the closing sentence in that receipt refers merely to a remark that Mr. Snyder made in your presence, that he wanted Bardwell to fix that Southern Railroad Association?

Ans. Is that my testimony in New York?

Cross-int. 332. Your testimony in this examination is: "Then what does this sentence mean: 'This notice is in conformity with the arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself?'

382 Ans. Merely a remark that Mr. Snyder made in my presence one day, that he wanted Bardwell to fix that Southern Railroad Association." Now, I ask you if that statement was correct. Does it refer merely to that?

Ans. It was correct as I then understood it at the time I made that statement.

Cross-int. 333. I am not asking you whether you meant it to be correct, but I am asking you, now that you have refreshed your recollection so much, whether you say that the remark you then made was true. Is it true that this closing sentence of the receipt merely refers to a remark that Mr. Snyder made in your presence one day, that he wanted Bardwell to fix that Southern Railroad Association?

Ans. I presume that relates more particularly, I should say now, having looked at all the papers, having examined my letter books to find the original letter sent with the certificate, which was produced in New York and which I hadn't seen for five years, with the whole transaction then out of my mind, never having read the letter of Bardwell's on the subject at all, I gave the testimony in

383 New York, as the thing was brought to my recollection from observation of the paper. Now, the impression fastened upon my mind is that my letter of Nov. 22 refers to a conversation had some two months before, when the fact of the money being paid by Snyder to Bardwell was made known in Snyder's presence.

Cross-int. 334. Do you think that is an answer to my question?

Ans. I do, sir, to the best of my knowledge.

Cross-int. 335. Do you think that the remarks you have made and the explanation you have given answer my question, whether the closing sentence of this receipt refers merely to a remark that Mr. Snyder made in your presence one day, that he wanted Bardwell to fix the Southern Railroad Association?

Ans. No; I have explained that the best I can.

Cross-int. 336. Can't you answer that question? You have had the benefit of your explanation. Now, can't you simply answer that question? Is it true that the closing sentence of that receipt refers merely to a remark that Mr. Snyder made in your presence one day, that he wanted Bardwell to fix that Southern Railroad Association?

384 Ans. It refers to more than merely that remark.

Cross-int. 337. What does it refer to?

Ans. It refers to the fact that Bardwell and I had had conversations and agreed on that statement.

Cross-int. 338. You said just now that the trust receipt you sent back was substantially a copy of something that Bardwell wrote on the 12th.

Ans. Yes, sir.

Cross-int. 339. The letter of the 12th is as follows:

"MY DEAR MCCOMB: Will you please acknowledge that you hold in 'the Southern Ass'n,' as trustee for (the benefit), or rather for C. B. Snyder, that am't of stock wh- you held as for me, Mr. Snyder having two months since p'd me its cost and interest.

"Truly yours, J. BARDWELL.

"Boston, Nov. 12th, 1869."

Ans. Exactly.

Cross-int. 340. When you say you copied your receipt from Bardwell's letter do you mean to say that you copied such a re-
385 ceipt as we have here from such a letter as I have read?

Ans. I don't think I said that.

Cross-int. 341. Didn't you say that you took it from Mr. Bardwell's letter?

Ans. I said part of it referred to the payment of money to Bardwell by Snyder; to an agreement between Bardwell and Snyder and myself that this contingent interest in the Southern Railroad Association stock should be recognized by me in favor of Snyder; that is about the substance of what I understand to be my answer.

Cross-int. 342. In your account of the interview in September, 1869, you say, as I understand you, that Mr. Bardwell told you that Snyder had let him have the proceeds of a mortgage.

Ans. About $40,000.

Cross-int. 343. You didn't understand that that had been a payment for the Southern Railroad Association stock, did you?

Ans. I didn't understand anything about it.

Cross-int. 344. When Mr. Bardwell wrote you on the 12th of November, "Mr. Snyder having two months since paid me
386 its cost and interest," that was news to you, was it?

Ans. How do you mean "news" to me?

Cross-int. 345. You had never heard of that before?

Ans. I don't think you are warranted in saying that.

Cross-int. 346. Saying what?

Ans. Haven't I testified that I heard in September that he had paid some money?

Cross-int. 347. The question is the difference between lending and paying money. You didn't hear in September that he had paid money on this stock, did you?

Ans. I didn't hear that he had ever paid money on this stock.

Cross-int. 348. When Mr. Bardwell wrote you, "Mr. Snyder having two months since paid me its cost and interest," didn't you understand that to mean that he had paid for that stock?

Ans. I understood in September from Mr. Bardwell, and have so testified, that he had gotten from Mr. Snyder $40,000, that is all I understood, and he wanted to settle with him by giving him a contingent interest in this stock. Now, the letter of the 12th of November is the first that I had heard that he had paid him
387 the cost and interest.

Cross-int. 349. My associate did not distinctly understand

whether you regarded the arrangement proposed and agreed to at the interview in September as a security for a loan or as a payment on the transferred stock. I understood you to say distinctly that it was security for the money that Bardwell owed Snyder.

Ans. It was a recognition of an interest of Snyder in the stock.

Cross-int. 350. Was Snyder to have an interest as collateral security or as owner?

Ans. He was to have an interest recognized as I have testified. I will state again in answer to your question that the stock stood in my name as trustee. It was held by me subject to an arrangement made with Bardwell for the payment of debts due to me then and which might arise. The understanding was that he wanted to give a contingent interest to Snyder, me to hold the stock as I then held it in my own name as trustee.

Cross-int. 351. What do you mean by "a contingent interest"—an interest by way of security or an interest as owner after other claims were satisfied?

388 Ans. After other claims were satisfied Snyder was to own it. Whenever the claims were satisfied, such as Bardwell should direct after my claim was paid, it would go to Snyder.

Cross-int. 352. Was it to be owned by Snyder subject to your claim, or was it to be security to Snyder for $40,000?

Ans. There was no condition made about the ownership being changed from me. The stock was to stand as it was then, in my name.

Cross-int. 353. Was Snyder to have anything more than security upon it for his $40,000?

Ans. He was to get the profits of it.

Cross-int. 354. He was to hold it not as security but for himself?

Ans. I don't know what was the particular arrangement between him and Bardwell. I was to hold it until Bardwell's indebtedness to me was paid, and when I was made whole it would have been paid over to him.

Cross-int. 355. If he was to hold it and was to have the dividends as his own and as security to repay him the $40,000, will you

389 be good enough to state whether you did or did not understand that Mr. Snyder was to acquire an interest in that stock by way of security, or whether he was to have the profits as equitable owner, if you know the meaning of the term?

Ans. I understand that the ownership of the stock—the certificates—was not to pass from my hands to Snyder or anybody else until the debts which might be due to me when the reckoning came with Bardwell were paid. In that case the stock would go to Bardwell when he paid his debt to this man, I suppose, he having some form of settlement showing that the trusteeship that I had assumed was settled as between him and Snyder; that the profits, whatever they might be, out of the stock came to him up to the sum of $40,000.

Cross-int. 356. To pay the $40,000 debt?

Ans. Yes, sir.

Cross-int. 357. And for no other purpose?

Ans. No other purpose.

Cross-int. 358. Then you never understood that Mr. Snyder had any other relation to that stock except to secure the amount of $40,000?

Ans. As far as the dividends went.

390 Cross-int. 359. That was to come out of the dividends?

Ans. That was to come out of the dividends.

Cross-int. 360. Then, when Mr. Bardwell wrote you on the 12th of November, "Mr. Snyder having two months since paid *paid* me it-costs and interests," what did you understand by that?

Ans. I thought then that was a question for him and Snyder to fix among themselves. I had nothing to do with that.

Cross-int. 361. That conveyed no special meaning to your mind?

Ans. No, sir. I wouldn't pay any attention to that. He didn't pay me the money.

Cross-int. 362. Did you suppose that Mr. Snyder had paid Mr. Bardwell cost and interest on that stock for the contingent interest you have spoken of?

Ans. I think he might have done it.

Cross-int. 363. Did you suppose he had?

Ans. I didn't make any supposition about it then.

Cross-int. 364. Was it worth it, then?

Ans. No, sir.

391 Cross-int. 365. How large were your claims against the stock of Bardwell at that time?

Ans. I suppose $50,000 or $75,000.

Cross-int. 366. And when you were asked for a receipt and acknowledgment that you held as trustee for C. B. Snyder, he having paid the cost and interest two months since, the cost and interest amounting to how much?

Ans. I didn't figure it up.

Cross-int. 367. Don't you know about how much?

Ans. No, sir; I haven't given it any thought.

Cross-int. 368. Can't you say about how much it came to without special thought?

Ans. No, sir.

Cross-int. 369. It came to between $40,000 and $50,000, didn't it?

Ans. I don't know, sir. I don't propose to answer without taking the figures and figuring it up.

Cross-int. 370. What did you state that it amounted to in the receipt?

Ans. I don't think I stated anything.

Cross-int. 371. You gave a receipt at that time, and in that receipt you said that it was an original subscription of $60,000, of

392 which 70 per cent. had been paid. I suppose it would not take you long to arrive at the conclusion that 70 per cent. on $60,000 is $42,000?

Ans. I shouldn't think it would.

Cross-int. 372. Then $42,000 with interest, since that amount had been paid, would be "cost and interest," wouldn't it?

Ans. I suppose it would.

Cross-int. 373. Now, did you understand that Mr. Snyder had paid $42,000 and upwards for something that was subject to from $50,000 to $75,000 claims by you?

Ans. I had no supposition about it. I wasn't present to ask Mr. Snyder what his suppositions were or what his thoughts were.

Cross-int. 374. Did you understand that the paper which you gave was subject to claims of yours amounting to from $50,000 to $75,000?

Ans. Yes; I did clearly understand it.

Cross-int. 375. Well, how do you make up from $50,000 to $75,000 that you held against the stock?

Ans. I say that by having transactions of notes. I can't now figure it. I only gave you that $50,000 or $75,000 as an estimate.

393 Cross-int. 376. It is pretty nearly correct, isn't it?

Ans. I wouldn't like to answer that without taking up the papers and looking them over.

Cross-int. 377. That is your best judgment of the amount?

Ans. Yes, sir.

Cross-int. 378. Now, you sent this receipt to Mr. Bardwell for Mr. Snyder?

Ans. I sent it to Mr. Bardwell for himself.

Cross-int. 379. Not for Mr. Snyder?

Ans. I didn't have any information as to what he was going to do with it. Mr. Bardwell didn't write me he was going to give it to Mr. Snyder.

Cross-int. 380. Didn't you know that it was for Mr. Snyder?

Ans. Why *I* should I?

Cross-int. 381. Answer my question and not put another. My question is: Didn't you know it was for Mr. Snyder?

Ans. How could I?

Cross-int. 382. Answer my question; didn't you know that

394 it was wanted for Mr. Snyder?

Ans. No, sir.

Cross-int. 383. Didn't you believe it was wanted for Mr. Snyder?

Ans. No, sir. If Mr. Bardwell had wanted it for the purpose of giving it to Mr. Snyder, why didn't he ask for a transfer of the whole thing?

Cross-int. 384. I am not reasoning with you on the whole subject; I am asking you questions.

Ans. Why didn't he take his money and give it to me and settle his debt?

Cross-int. 385. Will you be silent and answer the questions put to you?

Ans. I will try to be.

Cross-int. 386. You have said that you didn't know that Mr. Bardwell wanted this paper for Mr. Snyder?

Ans. I didn't know what he wanted it for.

Cross-int. 387. If you didn't suppose he wanted it for Mr. Snyder, what did you suppose Mr. Bardwell wanted that paper for?

Ans. I will tell you what I supposed. I supposed that
395 when he and Snyder were together some time he would, perhaps, show him that he had something from me recognizing an interest in him in the Southern Railroad Association. I didn't suppose he was going to give it to Mr. Snyder, because there was a very much shorter way *of* have done it and saved trouble—by sending me Snyder's money and ordering the stock transferred to him.

Cross-int. 388. June 15, 1874, you write to Mr. Snyder, care of Mr. Josiah Bardwell, "Dear sir: I have your letter with Mr. Bardwell's and memo. given by me to you through Mr. Bardwell," do you not?

Ans. Well, sir, I suppose so; don't it say so there?

Cross-int. 389. At that time did you not understand that this memorandum was given to Mr. Snyder through Mr. Bardwell?

Ans. I don't think I thought anything about it.

Cross-int. 390. That letter enclosed one from Mr. Bardwell of June 3d, 1874, of which you produced a copy. The letter of Mr. Bardwell's is the letter of June 3, 1874, is it not?

Ans. I cannot tell you. I would like to hear that read in connection.

396 Cross-int. 391. Is it the letter of which you furnished a copy this morning?

Ans. I do not know. Will you read it or let me see it?

Cross-int. 392. "I have your letter with Mr. Bardwell's and the memorandum given by me to you, but I don't know how I can help you." Now, the letter of Mr. Bardwell's is dated "Boston, June 3, 1874. My dear McComb: I expected to hear from you this morning on the Snyder matter." Is this the letter that was enclosed in it?

Ans. I think so, if it purports to be a copy.

Cross-int. 393. "I enclose memo. of agreement R. R. Ass'n. This will show the understanding as — is." That letter enclosed a copy of the receipt, didn't it, in 1874?

Ans. Yes, sir; that enclosed a copy of the receipt.

Cross-int. 394. "Mr. Snyder needs $30,000 or $35,000 in some way to help him out, and if he gets in bonds or otherwise that which will help over for sixty or ninety days his interest as well as mine will be served." What interests of Mr. Bardwell's did you understand were to be served in that way?

397 Ans. I didn't understand any interests.

Cross-int. 395. Didn't you understand that it related to the Southern Railroad Association?

Ans. I understood nothing but what the letter implies.

Cross-int. 396. What does the letter imply about that?

Ans. That Snyder was in distress, and if I could help him, do it; and if I helped Bardwell I would help Snyder.

Cross-int. 397. And how were you to help Bardwell by helping Snyder?

Ans. I cannot tell you that.

Cross-int. 398. You do not know that?

Ans. No, sir; he did not explain that; I do not know.

Cross-int. 399. "Please let me learn from you if you understand the enclosed as I do; and, if so, help me to relieve Snyder as we talked when you were in New York." What was the enclosed?

Ans. The enclosed is a copy of the certificate of the stock.

Cross-int. 400. Did you let him know?

Ans. I let him know that if he would give me security he could have——

398 Cross-int. 401. No; did you let him know whether you understood the enclosure as he (Bardwell) did?

Ans. I didn't write him at all.

Cross-int. 402. You made no reply immediately to that?

Ans. I made reply to Snyder, but not to Bardwell.

Cross-int. 403. Had you seen the trust certificate or receipt, or whatever it may be called, between the time you gave it and the time a copy was transmitted to you in 1874?

Ans. No, sir; I had not.

Cross-int. 404. Did you think, when you read it in 1874, that it conveyed only a contingent interest?

Ans. I never thought anything about it; the thing had become of so little consequence it didn't involve any thought.

Cross-int. 405. The 21st of July, 1874, you write to Mr. Snyder: "I have your favor of the 16th. I would have fixed what I agreed with Mr. Bardwell to do in this case had he met me here preparatory to my going South, as he promised and I expected he would do. I can send you the $30,000 Southern Railroad Associa-

399 tion paper, and will do it if you will return me the paper I signed, giving you so much of the benefits of the stock, which was in my name as trustee for Mr. Bardwell, and which I hold by agreement from him as collateral for advances made to him and F. Skinner & Co., which advances more than cover all this stock. Notwithstanding this, however, I agreed with Mr. Bardwell to give him this paper to help you out; am willing now, as I have always been, to do whatever I can to help him out of his dilemmas." Was that an offer to give $30,000 of the Southern Railroad Association paper for giving up this receipt?

Ans. It was not.

Cross-int. 406. What was the transaction that you proposed there?

Ans. I proposed that with Mr. Bardwell's security, which he had promised me he would give, I would give Snyder that paper and return the certificate.

Cross-int. 407. Were you to give Snyder the Southern Railroad Association paper?

Ans. I was to give it to Bardwell. I did not care what he did with it.

Cross-int. 408. "I can send you the $30,000 Southern Rail-

400 road Association paper and will do it if you will return me the paper I signed."

Ans. That was part of the condition that Bardwell had agreed.

Cross-int. 409. What was he to give up the trust receipt for?

Ans. Just as an additional security to me, because it was evident then that there was no profit.

Cross-int. 410. And you wanted to get the paper back in order to have evidence that there had been no profit upon it?

Ans. Not at all; but to cancel the transaction as far as Snyder went.

Cross-int. 411. You wanted to cancel the transaction by lending him paper, not by giving it to him?

Ans. Yes, sir; he was not entitled to it.

Cross-int. 412. That is all you meant by that?

A. Yes; that is all the paper was worth.

Cross-int. 413. It was not an offer to purchase at any price?

Ans. No, sir; I never made an offer to purchase at any
401 price.

Cross-int. 414. As you go on in the letter you speak of the nature of the paper: "If you will return to me the paper I signed, giving you so much of the benefits of the stock, which was in my name as trustee for Mr. Bardwell, and which I hold by agreement from him as collateral for advances made to him and F. Skinner & Co." Did you hold it for advances to F. Skinner & Co.?

Ans. That letter seems simply to say——

Cross-int. 415. I want to know what the facts were.

Ans. I suppose I did, perhaps.

Cross-int. 416. "Suppose you did, perhaps." Don't you know?

Ans. I do not know other than that my impression is this, that Bardwell gave notes of F. Skinner & Co. in which he was interested.

Cross-int. 417. Mr. McComb, the question is this: You have testified that you held this stock as collateral for advances you had made and were to make for Mr. Bardwell. You have not in your testimony that I remember—you will say whether you have
402 or not—referred to holding it as collateral for the debts of F. Skinner & Co. to you.

Ans. No, sir.

Cross-int. 418. Now, I find in this letter that you do speak of it as held as collateral for advances made to F. Skinner & Co. Now, I ask you whether, in truth and fact, the arrangement was that you were to hold it for advances to Bardwell alone or for advances to both him and his firm.

Ans. I would say it was to Bardwell alone.

Cross-int. 419. Then your impression is that the additional words "advances made to F. Skinner & Co." were not correct?

Ans. Well, I had a large indebtedness with Skinner & Co., and I was dictating these letters in a hurry. I was not writing them with my own hand, and I did not read them over.

Cross-int. 420. You do not think that was correct?

Ans. I do not think I held that particular stock for F. Skinner & Co.'s indebtedness. I held Skinner's own stock for that.

403 Cross-int. 421. Your advances more than covered all this stock, did they?

Ans. Yes, sir; my advances to Bardwell at that time were considerably more than $42,000.

Cross-int. 422. How much were they?

Ans. They were nearly $100,000. I proved $100,000, but not at that time; but they were nearly $100,000.

Cross-int. 423. You had written to Snyder about this before, and it appears by a letter which was read that you did give that receipt to Snyder through Bardwell.

Ans. Yes, sir.

Cross-int. 424. Had you ever before this letter of July 21, 1874, called Mr. Snyder's attention to the circumstance that you claimed a lien for advances on that stock?

Ans. The paper showed it. He had possession of the paper; he knew all I knew about it.

Cross-int. 425. Do you think that is an answer to my question?

Ans. I do, sir; a very honest answer.

Cross-int. 426. Had you, except by virtue of this paper, if that bears that construction, called Mr. Snyder's attention to the fact that you had made advances which were a lien upon that stock?

404 Ans. No, sir.

Cross-int. 427. Had ever anything been said relating to those advances in Mr. Snyder's hearing that you know of?

Ans. I do not know anything about that.

Cross-int. 428. That you know of; you do not know of any?

Ans. No, sir.

Cross-int. 429. The reply that Mr. Snyder made to your letter is in the case. Now, you wrote Aug. 31, 1874, to Leland, Allen & Bates: "Mr. Snyder's interest in the stock standing in my name in the Southern Railroad Association as trustee is only a contingent interest. This stock was held by me as security for advances made to a third party before I heard of Mr. Snyder in connection therewith, and it is therefore dependent upon the satisfaction of a prior lien thereon." You do not in that letter speak of any agreement by which the stock was to be subject to a lien for advances made after the date of your arrangement. There is nothing there said about future advances. What amount of advances at the time you wrote that letter was there which existed prior to the receipt given to Snyder?

405 Ans. I cannot answer that question from this date, sir.

Cross-int. 430. You spoke of holding stock as security for a certain $37,500 note, didn't you?

Ans. While it run.

Cross-int. 431. That note was paid?

Ans. Yes, sir.

Cross-int. 432. And you said you thought there might be $10,000 of other paper at that time?

Ans. Prior to the note.

Cross-int. 433. Aug. 31, 1874, was there anything more than that $10,000 left to be paid unless you held the stock for future advances?

Ans. Certainly there was.

Cross-int. 434. What?

Ans. A very large sum.

Cross-int. 435. I am not speaking of future advances, but of prior advances.

Ans. Advances prior to 1874?

Cross-int. 436. No; advance prior to Snyder's receiving that paper.

406 Ans. I should have to make up that account to tell that, to get the detail.

Cross-int. 437. Can you tell anything about it?

Ans. My recollection is that it was about $50,000 between February, 1869, including the $10,000 that was before that, and the 22d of November, 1869. I think there was more than $50,000 due from Bardwell to me.

Cross-int. 438. Going back once more to the interview of the last of September, 1869, what was agreed to be done when you gave Snyder the interest that was spoken of there? What were you to do, if anything?

Ans. There was nothing said between Bardwell and I what shape it should take. I suppose a mere acknowledgment from me was sufficient without any paper at all.

Cross-int. 439. It was left without anything being then contemplated to be done?

Ans. Yes, sir; without any writing as far as I knew.

Cross-int. 440. Have you a letter from Mr. Cutter dated "Boston, Oct. 25, 1873"?

Ans. I have not looked, sir; I was not directed to. I do not recollect of having seen such a paper.

Cross-int. —. Did Mr. Cutter write you the letter, a copy of which I now read you?

407 "BOSTON, *Oct.* 25, 1873.

"H. S. McComb, Esq.:

"DEAR SIR: Yours of the 21st was duly received; happy to have served you, and you will command me when I can be of use to you. Bardwell is quite well, and although financial matters are rather mixed here, he appears to keep up his usual spirits. Are the interests of F. Skinner & Co. in the Southern Railroad Association on which you advanced $60,000 still intact, and are they worth the loan and principal? How does the $60,000 of Mr. Snyder's stand affected?

"Yours truly, EDMUND F. CUTTER."

Did you receive such a letter as that?

Ans. If I did there is an answer to it here. I don't remember the letter, but Mr. Bangs says he has the answer to it. I told my clerks to hunt up all of Mr. Bardwell's letters.

Mr. BANGS: I produce, at the request of the plaintiff-, a paper placed in our hands by Mr. Fiske.

Cross-int. 442. Did you write that letter?

408 Ans. No, sir; it is not my writing nor signature.

Cross-int. 443. Who did write it?

Ans. One of my clerks, I presume.

Cross-int. 444. Who?

Ans. That looks like Moore's; I think it is Moore's, though I have two young men who write exactly alike—Thomas McComb and Moore.

Cross-int. 445. Was it written by your direction?

Ans. I do not know; I suppose it was; I dictate my letters and don't read them afterwards.

Cross-int. 446. Is it your letter?

Ans. It is not my handwriting.

Cross-int. 447. No; it is not your writing, but it was written by your clerk for you, wasn't it?

Ans. I presume I dictated it.

Cross-int. 448. Your letter is, "E. F. Cutter, Boston, Mass. Dear Sir: The Southern Railroad Association stands all right, and everybody's interest stands upright and square. Yours truly, H. S. McComb." Did you cause that to be written in reply to Mr. Cutter's inquiry, "Are the interests of F. Skinner & Co. in the Southern R. R. Association on which you advanced $60,000, still intact and are they worth the loan and principal"?

409 Ans. Well, sir, I had in my mind then that F. Skinner & Co. had no interest in it—not a partic*al* of interest.

Mr. BANGS: That is not an answer to the question.

Ans. (continued). I caused that letter to be written in answer to the other, I presume so, from its tallying so near in date. I have no recollection of seeing the other letter, but I have no doubt from the answer that I did.

Cross-int. 449. Have you any explanation to make of your answering the inquiry, "How does the $60,000 of Mr. Snyder stand affected?" in that way?

A. No, not now; five years afterwards.

Cross-int. 450. You have not?

Ans. No, sir.

Cross-int. 451. Don't you know how you happened to answer it in that way?

Ans. No, sir; it didn't give me a thought.

(Letter of Mr. Cutter marked "21, J. M. W. Y.," and reply of Mr. McComb marked "22, J. M. W. Y.")

Cross-int. 452. Was that (letter-press copy) written by your direction?

410 Ans. Yes, sir; that is, written by my dictation.

Cross-int. 453. Did you ever know of Mr. Snyder having any stock in the Southern Railroad Association except what particular interest he had in this receipt?

Ans. I will answer that in a few moments.

Cross-int. 454. Why don't you answer that now?

Ans. I have a right to wait. I would like to read it again.

Cross-int. 455. I am not putting a question about the paper; I am putting an independent question. I want you to answer.

Ans. No, sir.

Cross-int. 456. I will read the letter:

"WILMINGTON, *Feb.* 21, 1874.

"E. F. Cutter or Francis Skinner, 91 State street, Boston:

"If Jordan comes have him bring Mr. Marsh's resignation as director, so that we can reinstate him for the meeting and re-elect Marsh when we return. Or else, if Jordan cannot come, and Snyder does, have Marsh resign, and elect Snyder for business on the
411 road and reinstate Marsh when we get back. Important that he come thus qualified."

What were you going to have Snyder elected a director in the Southern Railroad Association for?

Ans. I asked him in that despatch to have him come qualified—that was, to bring the stock that stood in the name of Marsh, that stood in his name—and then elect him as director, so that we could have a full board.

Cross-int. 457. Was Snyder ever at a meeting of the Southern Railroad Association?

Ans. No, sir; he was in the office when meetings were being held two or three times.

Cross-int. 458. Won't you repeat your explanation which you have just given?

Ans. I said that my understanding of the despatch is that I asked Jordan to come if Marsh could not. If Jordan came he had stock standing in his own name, and some small amount had been put in Marsh's name to qualify him for a director. If Jordan came he needed no qualification if he brought Marsh's resignation on. If neither he nor Marsh came, then they were to turn the stock that stood in Marsh's name over to Snyder, so that Snyder could
412 be elected into the board. That was my understanding of the despatch.

Cross-int. 459. There is nothing said about any stock in Snyder's name?

Ans. "Thus qualified." He could not be qualified unless he brought stock. If Snyder came he would be of no use unless there was a resignation and he had a certificate of stock.

Cross-int. 460. You say nothing about any certificate of stock.

Ans. They are both synonymous; they could not be qualified without it.

Cross-int. 461. That is your explanation?

Ans. That is my explanation.

Cross-int. 462. Why did you want Mr. Snyder to come?

Ans. Because he could count one; that is all.

Cross-int. 463. That was in February, 1874?

Ans. Yes, sir.

Cross-464. At that time, according to your statement, Mr. Snyder's interest, a contingent interest, was subject to your claim of $100,000, was it?

Ans. Provided I got anything out of Bardwell's estate.

413 Cross-int. 465. "Bardwell's estate"? Bardwell was living wasn't he?

Ans. I understand it.

Cross-int. 466. When you say, "Provided you got anything out of Bardwell's estate," do you mean that the arrangement was that you were to get all you could of Bardwell's debts to you from other sources before you resorted to this trust?

Ans. I didn't understand anything of that kind.

Cross-int. 467. Why did you use the expression, "Provided you got anything out of Bardwell's estate"?

Ans. Simply because Bardwell was living and always telling me, as he told everybody else, so far as I could learn, that he was coming out all right and would pay everybody. I always felt that I was going to get one hundred cents on the dollars.

Cross-int. 468. Did you hear Charles Marsh testify yesterday?

Ans. Yes, sir.

Cross-int. 469. Do you remember the account he gave of the conversation between himself, yourself, and Snyder?

414 Ans. Well, I didn't charge my mind particularly with it sufficiently to relate it. I cannot relate it.

Cross-int. 470. Do you know the substance of it?

Ans. No, sir; I don't remember the substance of it. I didn't charge my mind with it, I thought it was so unimportant.

Cross-int. 471. Were you ever present at a conversation where Mr. Marsh was present in which you offered Mr. Marsh par and interest for the stock of Jordan, Marsh & Co. in the Southern Railroad Association?

Ans. Not in cash, sir; in bonds.

Cross-int. 472. In bonds?

Ans. Yes, sir; it is in writing—the proposition. I have the correspondence—their letters and mine.

Cross-int. 473. I did not ask you about correspondence. I asked you if you were ever present at a conversation in which you offered par and interest for their stock.

Ans. Payable in bonds? Yes, sir.

Cross-int. 474. Was Mr. Snyder present?

Ans. I do not remember that he was present. I do not recollect Mr. Snyder. Mr. Snyder may have been in the room.

415 Cross-int. 475. Did you say to Mr. Marsh, "I had to guarantee that to Snyder before he would go into it," or words to that effect?

Ans. No, indeed.

Cross-int. 476. You do not recollect Mr. Marsh's testimony? It made no impression on your mind?

Ans. No, sir.

Cross-int. 477. If he testified to that he testified untruly, did he?

Ans. He testified to a mistake, sir.

Cross-int. 478. Untruly?

Ans. To a mistake, sir.

Cross-int. 479. Did you ever say anything substantially like that to Mr. Marsh?

Ans. Never, sir; because, if I had, Snyder would have had it in writing very quick, and if I had said so I would have put it in writing.

Cross-int. 480. Nothing of the kind ever took place?

Ans. Nothing of my agreeing to guarantee his stock; never in the world.

Cross-int. 481. If Mr. Marsh testified to that, you wish to be understood as explicitly disagreeing with him; nothing similar could have been said?

416 Ans. To my guaranteeing his stock, no, sir. Mr. Marsh may have said, "Why, you would guarantee Snyder," but not that I said I would do it.

Cross-int. 482. What do you think Mr. Marsh may have said?

Ans. I think he may have said that I had done it just as an inducement to pay him more money for his stock; but I do not understand Mr. Marsh to have said that I guaranteed to do it, because I never would have done it.

Cross-int. 483. I did not understand what you said; just repeat it.

Ans. My idea of what Mr. Marsh may have said, if there was such an interview, was, "Why, you would guarantee Snyder's interest;" not that I had done it, because if he had said I had done it I would have told him it was not so right on the spot.

Cross-int. 484. What makes you think he may have said you would guarantee Snyder?

Ans. Just because I could not have done the other, that is why; it is an impossible thing.

Cross-int. 485. That you should have said so?

Ans. Yes, sir; that is so.

417 Cross-int. 486. Would you have guaranteed Snyder?

Ans. No, sir.

Cross-int. 487. What makes you think Mr. Marsh may have made such an observation?

Ans. I can't tell you what I think may have made him make such an observation further than I have expressed.

Cross-int. 488. There is no question but what those five acceptances on five months were for the purpose of a Southern Railroad Association transaction?

Ans. I do not recollect what that was for—the details.

Cross-int. 489. Those five drafts—were they not for the balance of profits on the Rock Island transaction?

Ans. Yes, sir.

Cross-int. 490. You first deducted $2,500 to $2,000?

Ans. Yes, sir; I think so.

Redirect examination.

(By Mr. BANGS:)

Int. 231. Mr. McComb, was the case of Snyder and McComb ever actually called for trial in the court in New York?

Ans. No, sir.

Int. 232. You were examined before trial at chambers?

418 Ans. Taken quite unexpectedly.

Int. 233. You were examined before trial at chambers?

Ans. Yes, sir.

Int. 234. Upon a short order from the judge?

Ans. Yes, sir; quite unexpectedly to me.

Int. 235. Had you any notice or was any request made to you to produce any documents or papers?

Ans. Not the slightest.

Int. 236. Had you examined any documents or papers?

Ans. Nothing at all.

Int. 237. When you have a stock operation through a broker is it customary to have a ledger account with the broker when you put up margins?

Ans. No, sir.

Int. 238. You simply charge him with the cash when you put up margins?

Ans. That is all.

Int. 239. And if it results in a loss?

Ans. Charge it to profit and loss.

Int. 240. And if it results in a profit you credit it with the cash?

Ans. Yes, sir.

419 Int. 241. Did you keep any account on a ledger of this operation in Rock Island?

Ans. Not at all; on my general ledger books.

Int. 242. Then your entries were simply cash items?

Ans. Simply cash items. I trusted to the broker to keep the account.

Int. 243. In 1873 was Mr. Marsh a director in the Southern Railroad Association?

Ans. I think he was part of the time.

Int. 244. During the whole of the year 1873?

Ans. I do not think he was the whole of the year. He was only in, I think, for about a year.

Int. 245. Do you mean to say that it is your recollection that in a conversation between you, Marsh, and Snyder anything whatever was said about a guarantee?

Ans. Oh, no; not in the least.

Int. 246. You have no recollection of anything being said about a guarantee?

Ans. Not a thing?

Int. 247. Did you ever, in fact, guarantee Snyder's interest in the investment in the Southern Railroad Association?

420 Ans. No, sir.

Int. 248. Or any other investment?

Ans. No, sir.

Int. 249. Did you ever have any transaction with C. B. Snyder?

Ans. No, sir; I never had any transaction with C. B. Snyder in my life.

Int. 250. Prior to receiving this letter of Cutter's inquiring about Snyder's stock had you ever heard anything from Snyder to the

effect that Cutter had any authority to put questions about his stock?

Ans. No, sir.

Int. 251. Had you ever known of any communication between Cutter and Snyder on the subject?

Ans. Not on the subject of the stock.

Int. 252. Mr. Cutter was a member of the firm of F. Skinner & Co.?

Ans. Yes, sir; and pretty generally conversant with their affairs.

Int. 253. The answer you gave, Mr. Cutter I suppose, was perfectly true—that "everybody's interest was upright and square?"

421 Ans. Yes, sir.

Int. 254. Your business has been very much diffused—that is, you have had a variety of business on your hands, haven't you?

Ans. Yes, sir.

Int. 255. Extending all over the country?

Ans. Yes, sir.

Int. 256. Enterprises involving the agency of a great many people?

Ans. Yes, sir.

Int. 257. Have you kept at all times the details of all those items of business enterprises in your mind?

Ans. Oh, no; not at all.

Int. 258. You have a large number of assistants who do a great deal of the details, do you not?

Ans. Yes, sir.

Int. 259. You are a manufacturer also?

Ans. Yes, sir.

Int. 260. As to writing letters, what is your practice?

422 Ans. My practice is to dictate letters to a clerk and sometimes very hurriedly, and he goes off and writes them and sends them off; very rarely I ever read them over. I may sometimes, but not usually.

Int. 261. You mean you dictate to a short-hand writer?

Ans. I dictate to a short-hand writer.

Int. 262. And he writes out the letters?

Ans. Yes, sir.

Int. 263. When you say you did not write these letters in the handwriting of Thomas McComb or Mr. Moore you mean that your hand was not actually employed in writing them?

Ans. Yes, sir.

Int. 264. You don't deny the responsibility?

Ans. Oh, no, sir; not at all.

(Mr. Bangs puts in evidence the examination of Col. McComb, taken in New York, which was marked "26, J. M. W. Y.," printed at page 226.)

HENRY S. MCCOMB recalled.

(By Mr. BANGS:)

Int. 265. Were you present this morning during the examination of Mr. Cutter?

A. Yes, sir.

Int. 266. You heard what he testified to as to the contents of Skinner & Co.'s book?

423 Ans. Yes, sir.

Int. 267. Will you state when you first knew or heard that the sum of $44.703.38 was credited to you upon the books of F. Skinner & Co.?

Ans. This morning.

Int. 268. And from whom?

Ans. Mr. Cutter.

Int. 269. When on the stand?

Ans. When on the stand.

Int. 270. Did you at the time of paying the money to Bardwell state on what account it was paid; and, if so, what did you say?

Ans. Yes, sir; I had requested Randolph & Co. to send to me, care of Skinner, the Rock Island account, whatever memorandum they had of it; I left Newport on the night of the 2d of August and came to Boston; on the morning of the 3d or 4th I received the account, whatever it was, that Smith, Randolph & Co. sent over. I handed that account to Mr. Bardwell, left it with him, and made drafts to balance the original investment.

Int. 271. Did you direct any of the entries on the books of F. Skinner & Co.?

424 Ans. No, sir; I never did that thing in my life.

Int. 272. Did you ever tell Mr. Snyder that you would take any stock of the Southern Railroad Association if he got tired of it?

Ans. I never did.

Int. 273. Did you ever tell him you would buy any stock of him at any price?

Ans. I never knew that he owned any.

Int. 274. Just answer that question directly. That is all right enough preliminarily.

Ans. What is the question?

Int. 275. Did you ever tell him you would buy any stock of him at any price?

Ans. No, sir.

Int. 276. Did he ever ask you to?

Ans. No, sir.

Recross.

(By Mr. FOSTER:)

Cross-int. 491. You said that you did not know that the Rock Island speculation was to be brought up at this trial until quite a little while ago?

Ans. Within about a week, perhaps.

425 Cross-int. 492. From whom did you then hear that?

Ans. My counsel here; they wrote a letter to me.

Cross-int. 493. From Mr. Russell?

Ans. Yes, sir.

Cross-int. 494. Can you explain why you wanted Mr. Snyder for a director instead of anybody else in whose hands stock might be put?

Ans. I wanted him to count in the vote; to get a quorum.

Cross-int. 495. Why would not somebody else answer just as well to take a nominal transfer of stock and temporarily hold the place?

Ans. Simply because Mr. Marsh was a director.

Cross-int. 496. I know, but if Mr. Marsh temporarily resigned why did you want Mr. Snyder to come on and take his place instead of Mr. Calhoun or anybody else who was in New York?

Ans. Mr. Calhoun was a director.

Cross-int. 497. Anybody else in New York; any friend or acquaintance of yours? What was your preference for Mr. Snyder?

Ans. No other than he was a Boston man, and Jordan was a large owner of stock, and Marsh was a director.

426 Cross-int. 498. You wanted Snyder because he was a Boston man and Jordan was a large owner of stock?

Ans. Yes, sir; and it seemed proper.

Cross-int. 499. What had the selection of Snyder as a director to do with Jordan being a large owner of stock?

Ans. I can't answer that.

Cross-int. 500. Had you ever told your counsel anything about the Chicago and Rock Island speculation prior to receiving the letter from Mr. Russell?

Ans. I don't think I had, sir.

Cross-int. 501. You don't know how they learned it, do you?

Ans. No, sir; only they learned it, perhaps, through me more recently when I came over or when I replied back to the letter.

Cross-int. 502. I thought you learned it through your counsel. What do you mean by saying that they learned it through you?

Ans. Let me make an explanation. The information I got from my counsel was that they supposed the drafts which I had already shown to them—of Bardwell on me—was to be an element

427 in the case and I looked up my book and found out what that was after they wrote me a little over a week ago.

Cross-int. 503. Meaning by that those five acceptances?

Ans. Those five acceptances. Then I traced the three drafts of Bardwell on Strang and Snyder in my book that I had there, and it stated that it was the Rock Island account, and I hunted up the documents.

Cross-int. 504. Then, when you found that those acceptances were given on the Rock Island account you hunted up the Rock Island transaction as far as you could?

Ans. I hunted it up as far as I could, with only a day or two to do it.

Cross-int. 505. Was the Chicago & Rock Island speculation mentioned to you by your counsel in that letter?

A. I don't recollect. They could tell themselves.

Cross-int. 506. Can't you tell?

Ans. No, sir; I haven't it in mind. I didn't charge my mind with it.

Cross-int. 507. How long ago did you receive it?

428 Ans. Some time last week, I think, or the week before.

Cross-int. 508. You cannot now tell whether there was any information conveyed by them to you about the Chicago & Rock Island?

Ans. I can't tell whether Rock Island was mentioned in it. They can produce the original.

Cross-int. 509. What is your impression?

Ans. I did not charge my mind with it at all after I came here where the original is, or a copy.

Cross-int. 510. You acted upon that letter in obtaining information about the Chicago & Rock Island transaction?

Ans. I acted upon that letter in relation to those drafts.

Cross-int. 511. That led you to the Chicago & Rock Island transaction and then you looked it up?

Ans. Yes, sir.

Cross-int. 512. There is no sort of question that those five acceptances represented the profits of the Rock Island transaction, is there?

Mr. BANGS: That I object to. The question has been answered.

429 AMES, J.: You can ask him how he understands it.

Cross-int. 513. How do you understand it?

Ans. I so understand it. I have tried to make it as plain as I could.

Cross-int. 514. These words in ink on the trust receipt, "Received Nov. 23, '69," you say were not there when you were examined in New York?

Mr. BANGS: I object to the question; he has not so said.

Cross-int. 515. Do you say so—that those words in ink, "Received Nov. 23, '69," were not there?

Ans. I do, sir.

Cross-int. 516. Did you say so yesterday?

Ans. I did, sir; they were not there in ink as they are now.

Cross-int. 517. You said there was something there in pencil?

Ans. Yes, sir.

Cross-int. 518. What was it?

Ans. I don't recollect; something in Bardwell's writing; some little memorandum that I interpreted to be Bardwell's writing. It was very indistinct.

430 Cross-int. 519. Is there any question that this "Received Nov. 23, '69," is in his handwriting?

Ans. That is his writing, I think, now.

Cross-int. 520. Your examination in New York was when?

Ans. I think three years ago.

Cross-int. 521. 1875?

Ans. I think so.

Cross-int. 522. What part of the year, Nov. 25?

Ans. I can't tell you the day of the month.

Cross-int. 523. Your examination was after Bardwell's death, was it not?

Ans. I think not; I don't remember that, sir.

Cross-int. 524. When did Bardwell die?

Ans. I think Bardwell died in '75 or '6.

Cross-int. 525. In '76; which?

Ans. I think '75.

Cross-int. 526. When were you examined?

Ans. I don't remember when I was examined. It was some three years ago. I didn't charge my mind with the date of it. I
431 should say that was in Bardwell's handwriting now.

Cross-int. 527. So you have testified that that has been put on since you saw the paper, and that it is in the handwriting of a man who was dead at the time you last saw it?

Ans. I testified that my recollection was that the memorandum on the top of that paper was in pencil.

Cross-int. 528. That it was your recollection; was that the way you put it?

Ans. Yes, sir; that is the way I put it; that was my recollection.

Cross-int. 529. Didn't you most distinctly reaffirm and reiterate that it was not there in ink at the time you saw it in New York?

Ans. That was my recollection when I spoke of it.

Cross-int. 530. Didn't you state, with the utmost distinctness and positiveness, as positively as anything you have sworn to?

Ans. I don't know; I would like to have you read what I did say.

Cross-int. 531. What is your recollection of what you said?
432 Ans. My recollection is what I have stated; my recollection is that it was a pencil memorandum on that paper.

Cross-int. 532. Didn't you testify positively yesterday that you knew it was not there?

Ans. That was my memory.

Cross-int. 533. Will you tell me if you didn't say positively that it was not there when you were examined in New York, and that it had been put on since; didn't you add those words?

Ans. I don't know whether I said that; I forget whether I said that or not. If I did it flashed upon me at the moment.

Cross-int. 534. You now know it must have been there when you were examined, don't you?

Ans. If my examination was subsequent to Mr. Bardwell's death I must have been mistaken.

Cross-int. 535. You wish to leave that so?

Ans. I was mistaken if Mr. Bardwell's death was previous
433 to my examination. I have no memorandum to fix the date of Mr. Bardwell's death.

Cross-int. 536. You testified, I think, that you were served with process when you came on to his funeral?

Ans. Exactly; but I don't know the day of the month.

Mr. FOSTER: The date of the commencement of this suit is fixed by the papers.

Mr. BANGS: There is no question on our side about that.

Redirect:

(By Mr. BANGS:)

Int. 277. Now, Mr. McComb, what I ask you is this: You have no doubt that those words on the top of that paper, "Rec'd Nov. 23, '69," are in Mr. Bardwell's handwriting, have you?

Ans. No, sir. That is what I should say.

Int. 278. Now, I call your attention to what you said on your examination in New York. You said there, "It does not say where it was written or signed. It may have been written in Boston and handed to him there. There is nothing on it that would enable me to tell where it was written or signed." You said, "That memorandum at the top, on the first line, is Mr. Bardwell's hand-
434 writing. I point it out so that you can see that the other is not." Now, is it your present impression and was it your impression yesterday that what you so pointed out was, at the time of your examination in New York, in pencil and now is in ink?

Ans. Yes, sir; that is what I say. It was in pencil. I thought it was Bardwell's memorandum.

Int. 279. There was, at the time when it was exhibited to you, a memorandum at the top in Bardwell's handwriting which you pointed out?

Ans. That is what I testified to in New York.

Int. 280. There is now a memorandum at the top in Bardwell's writing?

Ans. Yes, sir.

Int. 281. Only it is now in ink, and you thought it was in pencil at that time?

Ans. Yes, sir; that is the point.

Int. 282. When you wrote to Cutter in February, 1874, about changing the direction Jordan lived in Boston, didn't he?

Ans. Yes, sir.

Int. 283. And Snyder lived in Boston?

Ans. Yes, sir.

435 Int. 284. And you wanted Jordan's resignation?

Ans. Yes; Marsh's resignation.

Int. 285. Would it have been quite as easy to transfer his stock to some one in New York as to transfer it to some one in Boston?

Ans. Precisely, because it would have had to have been accompanied by Marsh's resignation.

Int. 286. I suppose the matter could have been done at once and Marsh and Snyder were here in Boston, engaged in business near each other, were they not?

Ans. Yes, sir.

Int. 287. It was a mere question of convenience?

Ans. That is all.

Int. 288. Did any question occur to you between getting anybody

in New York and anybody in Boston, as far as you remember, and did you deliberately reject all your friends and acquaintances in New York or was it simply the result of convenience?

Mr. FOSTER: That is a little leading.

AMES, J.: The last part is a little leading, but I do not
436 know that it is important. You can ask him how he came to select this man.

Int. 289. What consideration presented itself to your mind about Snyder?

Ans. The only thing that occurs to me now that influenced me then was the fact that there was no room for a director if Mr. Marsh came, for he was a director; there was no room for any other; the board was full if Mr. Marsh came, he being a director. I had telegraphed to Mr. Cutter if Mr. Marsh couldn't come, who was a large owner of stock—if Mr. Marsh couldn't come, then to send Snyder with Marsh's resignation and Marsh's stock, which would have completed the whole thing, and then he could have resigned and let Mr. Marsh come back when he got home; it was a mere matter of convenience. Mr. Snyder was in Boston, where this other gentleman was who was a director.

Int. 290. You understand that in the New York suit Mr. Snyder claimed that the sum of money with which he had entrusted you was $46,000?

Mr. FOSTER: How is this competent?

AMES, J.: It does not strike me that the inquiry is of any consequence.

437 Int. 291. I will put it in this form: When did it first attract your attention that the amount of the plaintiff's claim was $45,000?

Ans. Only when my counsel advised me of their amended application. He wrote that the four first counts had been withdrawn and a new one substituted.

Int. 292. For $45,000?

Ans. 45,000.

Int. 293. And it was your investigation of the facts founded on that which reminded you of those three drafts?

Ans. Yes, sir.

Int. 294. And that led to the subsequent consultations with your counsel?

Ans. Yes, sir.

25, J. M. W. Y.

Deposition of William G. Wilson.

C. BROWN SNYDER
v.
HENRY S. MCCOMB.

Interrogatories propounded to William G. Wilson, of the city, county, and State of New York, for the purpose of taking his deposition for use at the trial of the above-entitled cause, and the answers thereto.

438 Int. 1. Please to state your name, age, residence, and occupation.

Ans. My name is William G. Wilson; I am thirty-five years old; reside at New York city; my profession is that of a lawyer.

Int. 2. Are you a member of the bar of New York? If yea, state how long you have been a member of said bar and where and how long, if at all, you have practiced law, and state whether or not you are familiar with the laws of said State and with the rules of practice which regulate the practice in its courts.

Ans. I am an attorney and counsellor at law of the supreme court of the State of New York and have been such for about twelve years, practicing law in the various courts of the State during the whole of that period. I am familiar with the laws of the State of New York and with the rules of practice which regulate the practice in its courts.

Int. 3. Do you know Henry S. McComb, the defendant in the above-entitled cause; if yea, how long have you known him?

Ans. I know Henry S. McComb, of Wilmington, Delaware, the defendant. I first met him in November, 1875, in the
439 city of New York.

Int. 4. Did you ever examine the said McComb as a witness? If yea, state when, where, for what purpose, and in what cause, and state in what court said cause was then pending.

Ans. I did examine said McComb as a witness in a cause pending in the supreme court of the State of New York in and for the city and county of New York. The action was brought by C. Brown Snyder, the plaintiff herein, against Henry S. McComb, the defendant. The defendant McComb was so examined in that cause under an order made in said supreme court for his examination before trial as a witness at the instance of the plaintiff therein.

Int. 5. State what part you took in the examination of said McComb and whether or not the questions to and answers by said McComb were taken down in writing; if yea, by whom and for what purpose.

Ans. I attended personally before Justice Donohue, of the supreme court, upon the taking of the examination. I requested the
440 justice to swear the defendant McComb as a witness, and saw and heard the oath administered by said justice to him, and I personally conducted the examination as counsel for the plaintiff

in the action; th- questions and answers were taken down in short-hand by Andrew Devine and were afterwards written out by him and George R. Bishop, another stenographer, in long-hand; they were so taken down and written out as the official record of the examination, the justice before whom the examination was taken being unable in the pressure of other official duties to take it personally. I might add that on such examinations it is the practice to have the questions and answers taken down by counsel or a clerk or a stenographer employed for that purpose.

Int. 6. If the said questions and answers were taken down state whether the said examination or deposition was signed by said McComb; and, if yea, what was done with the same.

Ans. I did not see the defendant McComb sign his name to the deposition, but after it was fully written out in its present shape I handed it to Mr. Bangs, the defendant's attorney in the action, in order that Mr. McComb might examine it before signing it.

441 Afterwards I attended with Mr. Bangs at supreme court chambers on the 24th of November, 1875, pursuant to the stipulation annexed to the deposition, for the purpose of having it then subscribed and sworn to before the justice, but Mr. McComb, the defendant, failed to appear, and thereupon, at the request of Mr. Bangs, his attorney, the matter was postponed. Subsequently, on November 27, 1875, I called at the office of Mr. Bangs in relation to the matter, and then at his request assented to the stipulation, which appears lastly upon the deposition, that the same might be sworn to before and certified by a notary public with the same effect as it the same were done in court and before the justice. I then left the deposition with Mr. Bangs, and shortly after that he returned it to me in its present shape—that is, with a signature, "H. S. McComb," subscribed to it in the proper place for the witness' signature, and the signature, "Luciuc W. How, notary public, N. Y. Co.," subscribed to it in the proper place for the notary's signature. I subsequently filed the deposition so subscribed in the office of the clerk of the city and county of New York.

442 Int. 7. State, if you please, where the said deposition now is and when it was last seen by you.

Ans. To the best of my belief said deposition is now on file in the office of the clerk of the city and county of New York. I last saw it to-day upon this examination in the possession of Mr. Gumbleton, the county clerk. He produced it on this examination.

Int. 8. If you have stated that the said deposition is on the files of any court, state whether or not the same can be taken from said files so that it can be produced at the trial of the above-entitled case in Massachusetts. If not, why not? Please answer this question fully and particularly.

Ans. The deposition in question cannot lawfully be taken from the files of the office of the clerk of the city and county of New York, excepting as it may be produced by said clerk or his deputies properly authorized upon a trial or other judicial examination or proceeding within the limits of the territorial jurisdiction of the supreme court of the State of New York.

443 Int. 9. Can you state what said McComb testified to at the said examination? If yea, please state in answer to this question the questions which were asked him by you in conducting said examination and the answers which he made to such questions.

Ans. I can state that I read over the deposition of the defendant McComb after the same was reduced to writing in the shape in which it now is and immediately after his examination, when the whole matter was fresh in my recollection. The deposition as subscribed and as now on file corresponded with the questions and answers—that is, the questions put to the witness by myself and by his counsel, Mr. Bangs, upon said examination and the answers made by the witness thereto. The language of such questions and answers and the proceedings upon said examination appear fully in the exemplified copy annexed hereto, which I believe to be and which is, to the best of my recollection, a true and complete record of the examination and all the testimony and proceedings thereon.

Cross-interrogatories:

444 Cross-int. 1. If you say in answer to the fourth interrogatory that you ever examined the defendant in this suit, state for what purpose or in what suit or process.

Ans. I examined the defendant as a witness before trial on behalf of the plaintiff in the suit of C. Brown Snyder against Henry S. McComb, said defendant, then pending in the New York supreme court.

Cross-int. 2. Were you of counsel or in any way connected with it?

Answer. I was of counsel for the plaintiff in said action.

Cross-int. 3. Have you in your possession the pleadings or a copy of the pleadings in said suit? If so, please annex the same or a true copy thereof to your answer to this cross-interrogatory.

Ans. I produce a copy of the pleadings and annex them hereto for transmission.

Cross-int. 4. What disposition was made of said suit? Was it not discontinued on your application on behalf of the plaintiff?

445 Ans. The action was discontinued. I entered the order of discontinuance upon consent of attorneys. That is the only application which I made to the court. I had previously notified defendant's attorney of my willingness to discontinue the action.

Cross-int. 5. State when said suit was commenced and when discontinued.

Ans. The suit was commenced by service of summons on the defendant June 25, 1875. It was discontinued by the entry of the order I have mentioned Jan. 19, 1876.

Cross-int. 6. Was an application made in said suit to have the plaintiff in this suit examined in that suit? If so, have you the order, summons, or copy of the order or summons served upon said C. Brown Snyder in that suit? And if you have, please annex the

same to your answer to this interrogatory. If you have not got the said order or summons in your possession, state whether you ever had the same in your possession; and, if so, what was done therewith, where the same now is, and where you last saw the same.

Ans. An application was made in that suit to have the plaintiff examined therein. I produce copies of the order and summons to be annexed hereto.

446 Cross-int 7. Did said Snyder ever attend for examination, pursuant to said order, and was he ever examined thereunder or otherwise on said action, or did he refuse so to attend and be examined?

Ans. The plaintiff Snyder did not attend for examination under said order and was never examined thereunder or otherwise on said action. I cannot say that he refused to attend and be examined, but only that he did not attend.

Cross-int. 8. How long after such application was so made was it before said suit was discontinued?

Ans. The date of the application for Snyder's examination I suppose to be the date of the order, a copy of which I have produced to be annexed hereto; the date of the discontinuance I have already stated.

(Signed) WM. G. WILSON.

Subscribed and sworn to before me this thirtieth day of November, 1877.

(Signed) JOSEPH GUTMAN, JR.,
U. S. Commissioner, Southern District of New York.

447 26, J. M. W. Y.

Exhibit Attached to Wilson's Deposition "A."

New York Supreme Court—Chambers, New York.

Before Donohue, J.

C. BROWN SNYDER
v.
HENRY S. MCCOMB.

Nov. 23, 1875.

Present: Mr. Wm. G. Wilson, for plaintiff; Mr. C. W. Bangs, for defendant.

HENRY S. MCCOMB, the defendant, appeared pursuant to order for his examination before trial, hereto annexed, and, having been duly sworn, was examined, and testified as follows:

By plaintiff's counsel:

Q. You are the defendant in this action?
A. I presume so.
Q. Where is your residence?

A. Wilmington, Delaware.
Q. You know the plaintiff, Mr. Snyder?
A. Yes, sir.
Q. How long have you known him?
448 A. I suppose ten years.
Q. Have you ever seen him in the city of Boston?
A. Frequently.
Q. How long ago did you first see him there?
A. Ten years ago, I think.
Q. Do you know who introduced you to him or him to you; how you first formed his acquaintance?
A. No, sir.
Q. Do you remember having any interviews with him during the year 1869 on the subject of an investment or operation in the Southern Railroad Association?
A. No, sir.
Q. You know of some company or corporation entitled "The Southern Railroad Association"?
A. Yes, sir.
Q. What is that?
A. A corporation chartered by the States of Mississippi and Tennessee.
Q. During the year 1869 you had connection, of some character, with that enterprise, did you not?
A. As a director.
Q. You were one of the prominent men in it, I suppose?
449 A. I suppose so.
Q. And you say you had no interviews with Mr. Snyder, the plaintiff, during that year in reference to that enterprise?
A. I did not say that.
Q. Was that the fact or not?
A. I said I did not remember.
Q. Did you have any?
A. I do not recollect.
Q. Did you have any during the years 1868, '69, or '70?
A. I don't remember any interviews with Mr. Snyder specially. I have no means of fixing any particular date in either of those years of an interview with Mr. Snyder.
Q. Would you be certain that you had none during those years?
A. I would not.
Q. Do you remember any interview in the city of Boston with Mr. Snyder on the subject of this Southern Railroad Association at which Mr. Josiah Bardwell was present?
A. I have recollection of an interview with Mr. Snyder
450 in the city of Boston, but I cannot give any date, wherein Mr. Snyder merely alluded to some connection, through Bardwell, with the Southern Railroad Association.
Q. Can you fix that in any way by reference to the position of the enterprise at the time when you had that interview?
A. There was nothing in the position of the enterprise that would warrant my fixing any given date.

Q. I mean, can you remember what was the position of the enterprise at the time you had that interview?

A. No, sir.

Q. Whether the stock had all been issued or not?

A. I don't recollect anything about that.

(Objected to as immaterial and irrelevant, not pertinent to the allegations in the complaint.)

Q. Do you remember that any interview between yourself and the plaintiff in which the subject of his investing or becoming interested in any way in this Southern Railroad Association enterprise took place in Boston?

A. No, sir.

Q. Do you remember giving the plaintiff or sending to him
451 a receipt signed by you indicating any interest on his part in that association?

(Objected to. The paper, if it exists, ought to be produced.)

A. I decline to answer until the court decides whether I should or not. I will obey the order of the court.

(Question reserved.)

Q. Have you a good memory, Mr. McComb, or a poor one?

A. Other people are better judges of that than I.

Q. How do you find it in your own experience?

A. Like all human objects——

Q. Please answer my question without a dissertation.

A. Sometimes I remember things very well and sometimes I do not.

Q. Generally speaking, is your memory good or not?

A. It depends altogether upon the subjects to be thought about. If it is a thing that personally interests myself I have a good memory. If it is a thing that I do not deem of personal interest to myself I do not pay any particular attention to it and would have a very poor memory.

Q. If you make an effort to remember a thing you have less difficulty, I suppose?

452 A. I would remember very well the circumstance of being here because I am a party to it and it is a matter of moment to me perhaps; but I could not tell you what day of this year I was in New York unless it should be within a few days or weeks and possibly not at any time.

Q. You don't remember, then, any conversation with Mr. Snyder at which Mr. Bardwell was present on the subject of Mr. Snyder's becoming interested in this association?

A. I have already answered.

Q. (continued). For the reason, I suppose, that that was a matter that you did not consider yourself personally interested in?

A. I have already answered that question, and I doubt whether that suggestion of yours on that point is a proper one. If you will excuse me, I would like to have the judge rule on that. I will ask

the stenographer to refer to the answer that I gave before on that point.

The stenographer read the answer, as follows:

"I have recollection of an interview with Mr. Snyder in the city of Boston, but I cannot give any date, wherein Mr. Snyder merely alluded to some connection through Bardwell with the Southern Railroad Association."

453 The WITNESS: I repeat that answer.

Q. (A paper being shown to witness.) Please state whether that paper is signed by you.

A. That paper is signed by me.

(Paper marked "A D for identification A, Nov. 23, 1875.")

Q. When was that paper written by you?

A. I cannot tell you the precise time; it has no date.

Q. Do you remember what you did with it after writing it?

A. I do not, sir.

Q. Do you know how it now comes to be in the plaintiff's possession?

A. I don't know how it comes to be in his possession.

Q. Did not you send it to Mr. Bardwell at Boston some years ago?

A. I may have sent it to him or may have had it written in Boston and signed. It does not say where it was written or signed. It may have been written in Boston and handed to him there. There is nothing on it that would enable me to tell where it was written or signed.

Q. (A paper being shown to witness.) Look at this paper
454 and see if it will refresh your recollection on the subject.

A. This is not written by me and never seen by me before.

Q. Is it not written under your instructions?

A. I don't know about that. It is written by one of my clerks, and I don't know which one. There are half a dozen of them who write alike.

Q. This has a letter "M" underneath.

A. There are two of them who have "M."

Q. You cannot say whether that letter was written with your knowledge or under your instruction or not?

A. I cannot. I would prefer the man who wrote it to answer that, because in a great many cases I merely may say to them to "write a letter" to such a person.

(Paper marked "A D for identification B, Nov. 23, 1875.")

Q. What has become of the original subscription mentioned in this letter?

(Objected to on the ground that this paper has not anything to do with the cause of action set up in the complaint.)

455 The WITNESS: I prefer to have the judge rule on that point.

Q. Where was the arrangement made which is mentioned in this letter?

(Objected to on the ground that the paper does not refer to anything alleged in the complaint or appear to be in any way connected with the cause of action there stated.)

The WITNESS: I prefer to have the court rule on that point, too.

(The foregoing questions and objections, and also the question and objections on page 4, having been submitted to the court, the objections were overruled, and in each case defendant took an exception.)

Q. (repeated). What has become of the original subscription mentioned in this letter?

A. It is still in my possession or under my control.

Q. In what shape is it now?

A. Stock of the company, as it was then.

Q. In what name does it stand?

A. H. S. McComb, trustee.

Q. Has it so stood ever since this paper was written?

A. Yes, sir; ever since.

Q. Continuously?

456 A. Yes, sir.

Q. Who received the money for that subscription?

A. For which subscription?

Q. The subscription mentioned in this letter.

A. Who was that subscription made by?

Q. I ask you how that subscription was paid.

A. I presume it was paid by Mr. Bardwell to the company.

(By Mr. BANGS:)

Q. Do you know personally about Bardwell's transactions with the company unless you were personally present?

A. No, sir.

(By Mr. WILSON:)

Q. How did that subscription, then, originally get into your name as trustee?

A. Put so by Bardwell when he made the subscription.

Q. With your consent?

A. No, sir; I was not asked about it.

Q. You subsequently assented to it?

A. Yes, sir; that would indicate that.

Q. Well, this letter indicates that you held it as a trustee for C. B. Snyder, does it not?

A. I think I would rather that the court should make an

457 interpretation of that. It refers there under an agreement with Bardwell. You must take the whole thing together. I had no arrangement about it with Mr. Snyder at all.

Q. You had no arrangement with Snyder about it?

A. No, sir.

Q. Then what does this sentence mean: "This notice is in conformity with the arrangements made some two months ago between Josiah Bardwell, C. B. Snyder, and myself"?

A. Merely a remark that Mr. Snyder made in my presence one day that he wanted Bardwell to fix that Southern Railroad Association. That was the substance of his remark.

Q. Where was that remark made?

A. I think it was in Boston, in Skinner's office.

Q. Do you remember about when?

A. No; I do not.

Q. Was it in the year 1869?

A. I could only suppose.

Q. Well, what is your supposition?

A. I presume it was. I suppose it was.

Q. That is all the "arrangement" you know of?

A. Yes, sir.

458 Q. What did you understand that expression to mean?

A. That he and Bardwell had had some figurings, and they wanted him to have some interest in the Southern Railroad Association stock. I knew nothing about what their arrangements were between themselves.

Q. No explanation given?

A. No, sir.

Q. Then how did you come to write this paper?

A. At the instance of Mr. Bardwell. I think he wrote it and sent it to me to sign it, if it was not signed in his office.

Q. Is that his handwriting?

A. No, sir.

Q. Have you any recollectian about that one way or the other?

A. No, sir; I have not, because I didn't know it was in existence for some years. That memorandum at the top, on the first line, is Mr. Bardwell's handwriting. I point it out so that you can see that the other is not.

Q. Then what do I understand you to say that this "arrangement" means that you say this notice is in conformity with? Please explain a little better.

459 A. I don't know whether—if I were to explain it I would have to state first what the subscription was and the nature of it and how I came to have it.

Q. Whatever is necessary to explain that expression I would like to have you state.

A. Well, I don't know whether that expression is mine or whether I gave any attention to it.

Q. I ask you what you mean by an "arrangement" in this paper.

A. I understood that the profits——

Q. What you understood at the time.

A. What I understood at the time and what I have since understood is that the profits growing out of that subscription of that trustee stock went to Mr. Snyder, but that the original subscription

to the stock he had nothing to do with. That has been my understanding all along.

Q. That was your understanding then?

A. Yes, sir.

Q. That that subscription was made by Bardwell?

A. Yes; and that the profits were to go to Mr. Snyder.

460 Q. Can you explain, then, why you acknowledge that you hold it as trustee for C. B. Snyder?

A. Because it was already hypothecated to me for money loaned to Bardwell at the time I made that. I held it under hypothecation.

(Plaintiff's counsel moves to strike out this answer. Motion reserved.)

Q. What I ask you is why you acknowledge to hold it as trustee for C. B. Snyder if your understanding was that Snyder was only interested in the profits.

A. I did it at the instance of Mr. Bardwell and to gratify him, without considering particularly any of the details connected with it other than what I have stated.

Q. Have you told all the conversation between you and the plaintiff or in the plaintiff's presence in reference to this matter which occurred before this paper was signed by you?

A. I think so, sir. I don't remember anything else.

Q. There may have been more said which you do not remember, I suppose?

A. Yes; there may have been. It is not unlikely there may have been. I don't know; I don't remember.

Q. But that is all that you recollect?

461 A. Yes, sir; that is all. You speak now of what was between Mr. Snyder and myself?

Q. Between Mr. Snyder and yourself or in his presence.

A. Yes.

Q. Did you ever receive any of Mr. Snyder's money?

A. I never had a transaction with Mr. Snyder in my life.

Q. Then you never received any of his money?

A. Of course not.

Q. You never paid any money to him, then?

A. I do not know of ever having a transaction with him in my life of any kind or nature. I do not remember a single one.

Q. Do you remember any negotiations with Mr. Snyder for the purpose of or which had in view supplying him with your notes or notes of the Southern Railroad Association or both upon the security of his interest in the association?

(Objected to as immaterial.)

WITNESS: I have no objection to answer anything in
462 the world. I remember very well there are letters between Mr. Snyder and myself which will answer all those questions and which he can produce.

Q. You remember that there were such negotiations?

A. Yes, sir; there were letters passed between Mr. Snyder and myself with reference to certain notes of the Southern Railroad Association, and I prefer that those letters should be produced to answer.

Q. Were there not also personal interviews between you and Mr. Snyder in the city of New York?

A. No, sir; not alone.

Q. What do you mean by "not alone"?

A. Not between him and me. There were interviews, one, two, or three, with Mr. Bardwell present, but none between Mr. Snyder and myself alone.

Q. You mean that there were none, then, in which you and Mr. Snyder negotiated on that subject?

A. No, sir.

Q. Or had a conversation on that subject?

A. No, sir; only incidentally. Mr. Snyder's remarks were incidental to Bardwell's. The conversation was conversation between Bardwell and Snyder, and then he would turn and make some incidental remark to me about this thing. That was about the
463 whole of it. His interview here was following up Bardwell.

Q. For whom do you hold as trustee that stock which you mentioned awhile ago?

A. I don't know; that is just the disputed question. As soon as ever I find out who is the proper owner I propose to deliver it to him.

Q. You swear in your answer that you do not hold it for the plaintiff?

(Objected to as asserting what is not in the answer.)

A. No; I do not swear to that.

Question by Mr. BANGS:

Q. Have you any explanation to make of any of your answers?

A. Not that I know of. I have an explanation to make about that stock. I have only the explanation to make to the effect——

Q. In reference to the matter of which you wished to be reminded?

Mr. WILSON: I object to your stating anything about the stock.

WITNESS: Well, if there is any objection to it there is
464 no occasion to go into it; better take some other time.

Q. When you stated in this paper which has been produced that you held a subscription, did you mean that you held any money?

A. No, sir.

Q. What did you intend that the word should represent?

(Objected to.)

A. I don't care to answer anything subject to objection.

Q. I only ask you to explain that.

A. I hold no money; nothing belonging to Mr. Snyder.

Q. Had you received any subscription from him?

A. I have always answered that. I have answered that I never did.

Q. When you state that you had no transactions with Mr. Snyder, then you, of course, do not include the correspondence you had with him?

A. No, sir; I don't call that a transaction. I do not call the writing of a letter a transaction, unless there is a contract or agreement to do something, and in that respect the letter speaks for itself.

Q. Nothing resulted from that?

465 A. No, sir.

Q. And when in this notice you state that it is in conformity with the arrangements made between Bardwell, Snyder, and yourself do you mean that there was any arrangement made between you and Mr. Snyder?

A. I have always answered as fully as I care to.

(It is stipulated that after the verification of the foregoing examination the filing of it shall be waived, and also that the counsel and the witness shall meet at the supreme court chambers at 10.45 o'clock a. m. on Wednesday, the 24th inst., to verify the examination.

H. S. McCOMB.

The foregoing examination by the witness subscribed and sworn to before me the 27th day of November, 1875.

LUCIUS W. HOW,
Notary Public, N. Y. Co.

(21.)

It is hereby consented that the foregoing examination and deposition be sworn to before and certified by a notary public with the same effect as if sworn to in court before and certified by the
466 judge, the defendant having been duly sworn in court before the judge before examination, and it is further consented that the deposition need not be filed, but may remain in the possession of the plaintiff's attorneys until the trial of the action and to be then produced if called for.

N. Y., Nov. 27, 1875.

C. W. BANGS,
Def'ts Att'y.

(Endorsed:) Filed Jan. 19, 1876.

"EXHIBIT B," Attached to Wilson's Deposition.

Supreme Court, City and County of New York.

C. BROWN SNYDER
v.
H. S. McCOMB.

The complaint of the plaintiff above named against the above-named defendant respectfully shows to the court—

That heretofore and in or about the month of August, in the

year one thousand eight hundred and sixty-nine, the said plaintiff entrusted to the said defendant the sum of $46,000, the money of the plaintiff, upon an arrangement and agreement between
467 the plaintiff and the defendant that the said defendant should invest the same for the plaintiff in the capital stock of a certain company known as and entitled the Southern Railroad Association, of which said defendant was at that time the president, and thereupon to transfer such stock to the plaintiff, and the defendant received said money of the plaintiff upon the said arrangement and agreement which said defendant thereupon undertook and promised to carry out and perform.

That said defendant has never transferred to this plaintiff any such stock above mentioned, and has never rendered to said plaintiff any return whatever for the said money so entrusted to him, and has never accounted to said plaintiff for his acts and dealings with the said money or any part thereof, but has wholly failed so to do, although often thereto requested, and that the plaintiff has never received any of the said stock or any property or money whatsoever as or for the proceeds of the same, but that the said defendant has used and employed for his own purposes and in and about his own business and his own speculations the said sum of money so entrusted to him by the plaintiff as aforesaid, and has converted
468 the same to his own use, to the damage of said plaintiff $75,000.

Wherefore said plaintiff prays judgment against the said defendant for seventy-five thousand dollars, his damages as aforesaid, together with his costs and disbursements in this action.

WILSON & WALLIS,
Plaintiff's Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

C. Brown Snyder, being duly sworn. says that he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

C. BROWN SNYDER.

Sworn to before me this 24th day of July, 1875.

J. B. NONES,
Notary Public, N. Y., No. 91 Duane Street, Cor. Broadway.

469 New York Supreme Court.

G. BROWN SNYDER
v.
HENRY S. MCCOMB.

The defendant, Henry S. McComb, answering the complaint in this action, denies that in or about the month of August, in the year one thousand eight hundred and sixty-nine, or at any other time the

plaintiff in this action entrusted to this defendant the sum of forty-six thousand dollars, the money of the plaintiff or otherwise, upon any arrangement or agreement between the plaintiff and this defendant that this defendant should invest said sum for said plaintiff in the capital stock of a certain company known as or entitled the Southern Railroad Association, or to transfer any such stock of said Southern Railroad Association to the plaintiff, and this defendant denies that he was at the time mentioned in the complaint the president of the Southern Railroad Association.

And this defendant, further answering said complaint, denies that he, this defendant, received the money of the plaintiff mentioned in the complaint or any other money of the plaintiff upon the
470 arrangement or agreement mentioned in the complaint, or that this defendant undertook or promised to carry out or perform any such agreement or arrangement as is mentioned or referred to in the complaint or any arrangement or agreement respecting the matters or to the effect mentioned in the complaint.

And this defendant, further answering said complaint, admits that he has never transferred to the plaintiff any such stock as is mentioned or referred to in the complaint, and denies that he ever had or received any stock purchased with any money of the plaintiff received by this defendant of the plaintiff for that purpose or upon any understanding or agreement between the plaintiff and this defendant to the effect mentioned in the complaint or otherwise.

And this defendant, further answering said complaint, denies that any money was ever entrusted to him by or for the plaintiff for the purposes or upon any agreement or understanding mentioned in the complaint; and this defendant denies that he has never accounted to the plaintiff for his act or dealings with any money or any part of any money received by this defendant from the plaintiff or entrusted to this defendant by the plaintiff for the purposes or
471 upon any agreement or understanding alleged or mentioned in the complaint, or that this defendant has wholly or otherwise failed so to account, or that he has been thereto often or otherwise requested by the plaintiff or otherwise.

And this defendant, further answering said complaint, denies that the plaintiff was ever or is entitled to receive any of such stock as is alleged or mentioned in the complaint or any property or money whatsoever as or for the proceeds of any such alleged stock.

And this defendant denies that he, this defendant, has used or employed for his own purpose or in or about his own business or his own speculations or otherwise the sum of money alleged or mentioned in the complaint, or any sum of money entrusted to him, this defendant, by the plaintiff, as mentioned or alleged in the complaint; and he, this defendant, denies that he has converted to his own use any sum of money entrusted to him by the plaintiff as alleged in the complaint or for the purpose or purposes or upon any agreement or understanding alleged in the complaint or otherwise; and this defendant denies that the

plaintiff has sustained damage by reason of any matters or
472 things alleged in the complaint in the sum of seventy-five thousand dollars or any other sum whatever.

And this defendant, further answering said complaint, denies each and every allegation therein contained not hereinbefore specifically or expressly admitted or denied.

G. W. BANGS,
Defendant's Attorney.

STATE OF NEW YORK, } *ss:*
City and County of New York, }

Henry S. McComb, being duly sworn, deposes and says that he is the defendant in this action; that he has read the foregoing answer and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

H. S. McCOMB.

Sworn to before me this 26th of August, 1875.

LUCIUS W. HOW,
Notary Public (21), *N. Y. Co.*

473 EXHIBIT "C," Attached to Wilson's Deposition.

N. Y. Supreme Court.

C. BROWN SNYDER }
v.
HENRY S. MCCOMB. }

Upon the affidavit of Henry S. McComb, the defendant in this action, and the pleadings and proceedings herein, it is ordered that an examination of the plaintiff, C. Brown Snyder, as a witness herein be taken prior to the trial of the said action pursuant to sect. 391 of the code, and that such examination be had at the chambers of this court, at the court-house, in the city of New York, on the twenty-sixth day of November, 1875, at 10½ o'clock in the forenoon, and that said plaintiff attend at the time and place aforesaid for such examination.

Dated New York, November 16, 1875.

CHAS. DONOHUE, *Judge.*

Chas. Donohue, J. S. C.

It is hereby consented that the examination of the plaintiff, under the within order, summons, etc., be adjourned to November 30, 1875, at 11 a. m., at which time and place plaintiff will
474 at-end to be examined thereunder.

N. Y., Nov. 24, 1875.

C. W. BANGS,
Att'y for Def't.

It is hereby consented that above examination be further adjourned to Dec. 7, 1875, at 11 a. m., at which time and place plaintiff is to attend and be examined.

New York, Nov. 30, 1875.

C. W. BANGS,
Def't's Att'y.

N. Y. Supreme Court.

C. BROWN SNYDER
v.
HENRY S. MCCOMB.

To C. Brown Snyder, the above-named plaintiff:

You are hereby summoned and required personally to be and appear before one of the justices of the supreme court of the State of New York, at the chambers of the said court, at the court-house, in the city of New York, on the twenty-sixth day of November, 1875, at 10½ o'clock in the forenoon, to be examined as a witness prior to the trial of this action pursuant to sect. 391 of the
475 Code of Procedure.

And for a failure to attend and be examined as aforesaid you will be liable to be attached as for a contempt and to have your pleading in this action stricken out.

Dated New York, Nov. 16, 1875.

CHAS. DONOHUE, *Judge.*

Chas. Donohue, J. S. C.

Defendant's counsel next offers in evidence all the exhibits forming a part of "Exhibit A for identification" so far as they have not heretofore been offered in evidence.

(Objected to by plaintiff's counsel as irrelevant and immaterial.)

The following is a copy of such exhibits:

20, J. M. W. Y.

MY DEAR FRIENDS: I notice the extra charges for money for about 19 days on my reading acc't amounts to $7,312.08 besides $3,978.96 for int. Pretty severe—I had thought those charges included the interest and were not as the acc't shows, over int.
476 In future acc'ts I must have this money business arranged before ordering purchases.

Please give me at Boston, care of F. Skinner & Co., the amount I remitted on acc't of J. Bardwell, to credit of the special Rock Island acc't.

If convenient, I propose giving Mr. Bardwell a d'ft on you for that precise amount, about Wednesday or Thursday of this week.

Keep me advised hereafter at Boston, care of F. Skinner & Co., daily prices of Rock Island and Mich. Southern. I have no other

stocks. I don't care to know prices of any others now. When will Mr. Randolph return?

Meanwhile I am, truly &c., H. S. McCOMB.

Aug. 2, 1869.

We leave for Boston to-day.

H. S. McC.

23, J. M. W. Y.

WIL'N, *Feb.* 21, 1874.

E. F. Cutter of F. Skinner & Co., 91 State St. Boston.

If Jordan comes, have him bring Marsh's resignation as
477 director, so that we can reinstate him for the meeting, and re-elect Marsh when we return. Or else, if Jordan cannot come, and Snyder does, have Marsh resign, and elect Snyder for business on the road, and reinstate Marsh when we get back. Important that he comes thus qualified.

H. S. McCOMB, *Pres.*

(D. H. A., 195.)

24, J. M. W. Y.

BOSTON, *Novem.* 20, 1874.

C. B. Snyder, Esqr.

DEAR SIR: On the 4th August, 1869, we received the sum of $44,709.38 and paid as follows:

June 29, 1869		$37,580 00
Octo. 1, "		2,305 44
Aug. 25, 1870		4,100 00
		$43,985 44

and Mr. Bardwell's note, due Sept. 2d, 1870, for $4,172.58, lays under protest, as far as we know.

The above receipt and payments being on account of your subscription to the Southern R. R'd Association.

Yours truly, EDM'D F. CUTTER,
Of F. Skinner & Co.

478 S, J. M. W. Y.

[Two dollars and fifty cents U. S. int. rev. stamp, cancelled.]

$6,641.56. BOSTON, *Sept. 15th*, 1869.

Five months after date pay to the order of myself sixty-six hundred and forty-one dollars $\frac{56}{100}$.

Value received, and charge the same to account of—

J. BARDWELL.

To H. S. McComb, Esq., Wilmington, Delaware.

[Fifty cents U. S. int. rev. stamp, cancelled.]

[Twenty-five cents U. S. int. rev. stamp, cancelled.]

[Ten cents U. S. int. rev. stamp, cancelled.]

Accepted by H. S. McComb.
Paid Feb'y 18, 1870, by check on New York.
Indorsed by J. Bardwell, C. B. Snyder, Leland, Allen & Bates.

[Two dollars and fifty cents U. S. int. rev. stamp, cancelled.]

$6,641.56. BOSTON, *Sept.* 15, 1869.

Five months after date pay to the order of myself sixty-six hundred and forty-one dollars $\frac{56}{100}$.
479 Value received, and charge the same to account of—
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To H. S. McComb, Esq., Wilmington, Del.

Accepted by H. S. McComb.
Paid Feb'y 18, 1870, by check on New York.

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J. BARDWELL.

To H. S. McComb, Esq., Wilmington, Delaware.

Accepted by H. S. McComb.
Paid Feb'y 18, 1870, by check on New York.

[Fifty cents U. S. int. rev. stamp, cancelled.]

[Twenty-five cents U. S. int. rev. stamp, cancelled.]

[Ten cents U. S. int. rev. stamp, cancelled.]

Indorsed by J. Bardwell, C. B. Snyder.

480 6,641.56. BOSTON, *Sept. 15th*, 1869.

Five months after date pay to the order of myself at the National Park B'k, N. York, sixty-six hundred and forty-one dollars $\frac{56}{100}$.
Value received, and charge the same to account of—
J. BARDWELL.

To H. S. McComb, Esq.

Paid Feb'y 18, '70, thro. Park b'k.

[Three dollars and fifty cents U. S. int. rev. stamp, cancelled.]

Indorsed by J. Bardwell.

6,641.56. BOSTON, *September 15th*, 1869.

Five months after date pay to the order of myself at National Park B'k, N. Y., sixty-six hundred and forty-one dollars $\frac{56}{100}$.

Value received, and charge the same to account of—

J. BARDWELL.

To H. S. McComb, Esq., Wilmington, Del.

Accepted by H. S. McComb.
Paid Feb. 18, '70, thro. Park bank.

[Three dollars U. S. int. rev. stamp, cancelled.]

[Twenty-five cents U. S. int. rev. stamp, cancelled.]

[Ten cents U. S. int. rev. stamp, cancelled.]

Indorsed by J. Bardwell.

481 T, J. M. W. Y.

BOSTON, *Sept.* 17, 1869.

MY DEAR FRIEND MCCOMB: I have yours (of 15th) without date advising balance, etc., due. Now, if it suits your convenience and pleasure, it will be agreeable to me and to parties in interest, to send me your acceptances, five months, as per enclosed memorandum, which I have added interest at the rate of seven per cent, from Sept. 15; with these I will settle with Snyder and parties in interest. When I see you, I will tell you how I have settled with S. and others, that you may agree with me that it is fair and right. I will enclose the memo. in a separate envelope, and you may send the aac. if so it suits you in a personal envelope to me. I fear I shall not go to New York next week as I am very much engaged here. I do wish you could be here next Tuesday, for then I think we can see the end of our mutual interest in the U. P. R. R., then you and the Dr. will tell what you will do, and by your conclusions there will be an end of the matter, for I will not follow it longer. I shall try and have the Dr. here Tuesday, and then if you and I and he agree the whole matter may be arranged, and to our best interests.

482 As things now are, I am more and more disgusted each day, and feel as though I cared only to be clear out of it. If I can have you and the Dr. Tuesday morning for an hour I will agree to clear myself of all farther worry on this subject. Please telegraph me on receipt that you will be here Tuesday and I will not call on you again. I will do nothing about making the drafts for the $34,219.89 until I see or hear from you; but I do think it of some considerable importance that you are here Tuesday.

Yours truly, J. BARDWELL.

Defendant's counsel gives notice that, if necessary, on the hearing of this cause he shall ask leave to amend the answer by setting up, so far as objection may be taken by the complainant and so far as necessity may require, the proceedings stated in Defendant's Exhibit

1, of February 2, 1885, as a bar to this suit by way of plea or by way of matter in the nature of a plea.

Adjourned to Tuesday, February 24, 1885, 3.30 p. m., and also to Saturday, February 28th, 3.30 p. m.

483 NEW YORK, *April* 11, 1885.

At the office of Messrs. Marsh, Wilson & Wallis.

Present: Mr. Wilson, for complainant; Mr. F. N. Bangs, for respondent.

WILLIAM CALHOUN, called as a witness on the part of the respondent, being duly sworn, testified as follows:

By Mr. BANGS:

Q. 1. Mr. Calhoun, were you connected with the Southern Railroad Association?

A. Yes, sir.

Q. 2. Did your connection with it commence before or after it was incorporated?

A. After.

Q. 3. And what was the date of the commencement of your connection?

A. I think it commenced about the middle of August, 1870.

Q. 4. And how long did it last?

A. It lasted up to the present time, I may say.

Q. 5. You never heard of its being dissolved?

484 A. No, sir.

Q. 6. In what capacity were you connected with it?

A. Generally in a clerical capacity—that is, I first investigated the accounts and straightened them out, and then subsequently I became the secretary and treasurer of the company. Of course, I was not the treasurer all the time.

Q. 7. When were you treasurer?

A. Well, after the consolidation, I think, of the two lines—the Jackson road and the Mississippi Central.

Q. 8. At what place were you occupied?

A. In New York here.

Q. 9. And were you sometimes in New Orleans?

A. Yes, sir.

Q. 10. And sometimes in Mississippi?

A. Yes, sir. I was a- various places along the line—at Jackson, Tennessee, &c.

Q. 11. Did you become personally acquainted with the location of and connections with the property?

A. Oh, yes; quite intimately.

Q. 12. What were the termini of the road—that is, the road
485 originally leased by the Southern Railroad Association?

(Objected to by Mr. Wilson as immaterial, irrelevant, and incompetent.)

A. It commenced at Canton, Mississippi, originally, and ended at Jackson, Tennessee.

Q. 13. And what was the length?

A. About two hundred and thirty-six miles, if I remember correctly.

Q. 14. You remember that the property which was leased belonged to the Mississippi Railroad Company as lessor?

(Objected to by Mr. Wilson as irrelevant, immaterial, and incompetent.)

A. Yes, sir.

Q. 15. And then it became consolidated, you say, with the New Orleans, Jackson and Great Northern?

A. The Mississippi Central; yes, sir.

Q. 16. And by what name was the consolidated corporation known?

(Same objection.)

A. The New Orleans, St. Louis and Chicago Railroad
486 Company.

Q. 17. Do you remember what amount of annual interest upon mortgages the Southern Railroad Association paid or had to pay—that is, upon mortgages of the Mississippi Central railroad?

(Same objection.)

A. Yes, sir; I think I do; I think I do remember.

Q. 18. About what amount?

A. The first mortgage on the Mississippi Central amounted to one million two hundred and fifty or sixty thousand dollars, I think. The first mortgage was at seven per cent.; then the second mortgage of the Mississippi Central amounted to two millions of dollars, and that was at eight per cent.; then there were some interest obligations which had been funded, if I remember rightly, amounting to about five hundred thousand dollars, upon which the interest was either at seven or eight per cent.; I forget which at present; eight per cent., I think.

Q. 19. And what was the condition of the road and property in 1870?

(Objected to by Mr. Wilson as immaterial and irrelevant.)

487 A. It was in a very bad state—very bad condition.

Q. 20. Was it in operating condition?

A. Oh, in operating condition; yes, sir.

Q. 21. It ran trains?

A. Oh, yes, sir; it ran trains.

Q. 22. But how as to the extent of repair and construction required at that time?

A. A great deal of money had to be expended, not only upon new construction, as it were—reconstruction—but upon current repairs. It was difficult to keep the road in order.

Q. 23. Was there any peculiar or particular danger to which it was exposed from its locality?

(Same objection.)

A. Well, I think so, in consequence of the nature of the soil; it was the alluvial soil which the Missi-ppi spread ever each side of its banks, and, of course, that extends a considerable distance each side. That soil was soft, and rain would wash it out very easily—make great gullies in the earth.

Q. 24. Was it near enough to be affected by the overflows of the Mississippi?

488 (Same objection.)

A. Not the Mississippi Central.

Q. 25. Was there any part of the consolidated road that was?

A. Yes, sir; the Jackson road—a part of it. There were two crevasses—one in 1871 and, I think, one in 1873—where the river ran into Lake Pontchartrain.

Q. 26. Did you ever see the lease under which the unincorporated Southern Railroad Association and afterwards its successor, the corporation (that is, the lease from the Mississippi Central), ran the road and operated the property?

A. Yes, sir; I have seen it.

Q. 27. You got from that information as to certain liabilities assumed by the lessee, did you?

A. Yes, sir.

Q. 28. Can you say what provision was made for those, in fact, by the lessee?

Mr. WILSON: I object so far as the question calls upon the witness to state the contents of any instrument.

489 Mr. BANGS: I don't want the witness to state the contents of any instrument, but to state what, in fact, they did.

Mr. WILSON: Objected to, that what in fact they did under an instrument is an indirect mode of calling for its contents.

The WITNESS: They took the assets and they assumed the liabilities of the unincorporated association.

Q. 29. They assumed the liabilities, I know, but what did they do towards meeting that assumption?

A. Oh, they raised money.

Q. 30. Did you become acquainted with the amount of business done by the company and its receipts?

A. Yes, sir; that was in my line.

Q. 31. Well, how did the receipts from the operations of the road compare with its current expenses and recurring liabilities?

A. Well, I think in a sense they were constantly greater—that is, the liabilities were constantly increasing—from the fact that the Southern Railroad Association had not only to meet the interest on its obligations, but it had also to keep the construction and repair account constantly going, and that required a good deal of money.

490 Q. 32. Was there ever enough received from its earnings to make any return to its stockholders?

(Objected to by Mr. Wilson as immaterial.)

A. No, sir; never.

Q. 33. Did you know of any railroad operations or enterprises of the Pennsylvania Railroad Company or the Pennsylvania Company in the States of Tennessee, Mississippi, or Louisiana?

(Objected to as immaterial and irrelevant.)

A. I knew at the time that the Pennsylvania Company, under another name, the Southern Security Company, controlled the Memphis & Charleston road, and as far as I could learn at that time they were looking toward that direction of country for business.

Q. 34. What was the geographical relation of the Southern Railroad Association's property—I speak of it as well after the consolidation as before—to the property which the Pennsylvania Company controlled?

(Objected to on the same grounds.)

A. Well, the property controlled by the Southern Railroad Association was in a north and south line, and the property controlled, so far as I learned anything about it, by the Pennsylvania
491 Company was east and west.

Q. 35. What was the point of junction?

A. The point of junction was Grand Junction—a place called Grand Junction, in Tennessee.

Q. 36. Did you hear the question of business arrangements with the Pennsylvania Company discussed?

(Same objection.)

A. No; never.

Q. 37. By anybody?

A. No, sir.

Q. 38. Did you form any opinion as to any advantage to be derived from a union or joinder of interests between the Southern Railroad Association and the Pennsylvania Company or as to the advantages to be derived from the Pennsylvania Company managing or controlling the property of the Southern Railroad Association?

(Objected to as immaterial.)

A. No; I don't think I did.

Q. 39. You formed no opinion?

A. No, sir; I cannot say that I did.

492 Q. 40. Do you know of that company in fact exercising any control over the New Orleans, Jackson & Great Northern or over the Southern Railroad Association?

(Objected to as immaterial.)

A. They did exercise a control, for the reason that at a certain

period they had the controlling interest in the stock of the Southern Railroad Association.

Q. 41. Well, how did they exercise that control? I mean by what means, through what agencies—by voting power?

(Same objection.)

A. Yes, sir; by voting power.

Q. 42. After that was there any change in the methods of operating the roads?

(Same objection.)

A. None whatever.

Q. 43. I mean as to business connections or traffic.

A. I may be mistaken, but I think there was a running arrangement with the Memphis & Charleston road. I think there was, although I won't be certain of that just at present.

493 Q. 44. What was the effect of that upon the business?

(Same objection.)

A. Well, I cannot say that it was very material.

Q. 45. One way or the other?

A. No, sir.

Q. 46. Did you know of that arrangement being in contemplation?

(Same objection.)

A. I did not.

Q. 47. Or had you any opinion as to benefits to be derived from it?

(Same objection.)

A. No, sir.

Q. 48. Did you ever know of any sales of stock of the Southern Railroad Association?

A. Yes, sir; I did. Stocks were sold because there were transfers.

Q. 49. Did you know anything about the terms?

A. No, sir.

Q. 50. Were you a stockholder?

A. Yes, sir.

494 Q. —. Are you now or did you cease to be?

A. I think I have ceased to be.

Q. 52. Well, you have lost your certificate, haven't you?

A. Yes, sir.

Q. 53. But you transferred your stock?

A. Yes, sir.

Q. 54. Without delivery of the certificates?

A. Yes, sir.

Q. 55. How much were you a stockholder in the Southern Railroad Association; to what extent?

A. Oh, only to the extent of ten shares.

Q. 56. When did you begin to be a stockholder?

A. About 1874, I think.

Q. 57. Do you know whether the stock was marketed here in New York at all; was on the market?

A. No, sir; it was not on the market.

Q. 58. Or in any other city?

A. No, sir; it was not on the market here; not in the technical sense.

Q. 59. Well, was it listed on the stock exchange?

A. No, sir.

495 Q. 60. Was it offered in brokers' offices anywhere that you know of?

A. No, sir; nor named among the miscellaneous securities sold in New street here.

Q. 61. Now, suppose I put the same question to you as to Philadelphia, Baltimore, Louisville, and New Orleans.

A. It was not known in the market at all.

Q. 62. Was it a losing or gaining concern during the time of your connection with it?

(Objected to as irrelevant and immaterial.)

A. It was a losing concern, sir.

Cross-examination.

By Mr. WILSON:

Q. 63. In what you say in regard to dealings in this stock you only speak so far as you have personal knowledge, I suppose, Mr. Calhoun?

A. Well, my personal knowledge, I think, extends to the fact that it was not listed on the stock exchange, and that it was not named among the miscellaneous securities which are sold in New street—those usually quoted in the market by brokers who deal in

496 Southern securities. I happen to be more or less acquainted with the brokers who deal in that sort of security, both shares and bonds, and it was not known.

Q. 64. But you could not say but what some brokers here and elsewhere might occasionally have had some of this stock in their hands for sale?

A. I never knew of that.

Q. 65. You could not say it was not so from your own knowledge?

A. Oh, of course I could not say that.

Q. 66. And was it not a fact that there were occasional transfers of the stock on the books of the company?

A. Yes, sir; but they were between the original people mostly—shareholders.

Q. 67. Entirely so?

A. Almost entirely so; there were some exceptions.

Q. 68. There were exceptions.

A. Yes, sir; there were exceptions.

Q. 69. Do you know whether this stock was dealt in in Boston at all?

A. No; I do not; I don't know that it was.

497 Q. 70. And don't know that it was not?

A. No; I don't know. I can't say much about Boston with reference to the stock.

Q. 71. And the ten shares that were transferred to you in 1874, did you buy those?

A. Yes, sir; I bought them and paid for them.

Q. 72. From whom did you buy them?

A. I think I got those from Mr. George Walker, who is now the consul general in Paris.

Q. 73. When did the company cease to have any active organization?

A. After the consolidation of the two lines.

Q. 74. What year was that?

A. The consolidation occurred on the 3rd day of July, 1874; I think that was the date?

Q. 75. Did the control of the property pass out of the hands of your corporation then?

A. No; they were the principal stockholders—the Southern Railroad Association.

Q. 76. Well, who managed the consolidated lines?

A. Colonel McComb and the directory elected on the third day of July.

498 Q. 77. Through the control of the stock which belonged to the Southern Railroad Association?

A. Mainly; yes, sir.

Q. 78. And what became of that enterprise—the consolidated lines?

A. The consolidated lines went into the hands of a receiver on the 10th of March, 1876, and then subsequently passed into the hands of the Illinois Central by the process of foreclosing the consolidated mortgage—a junior mortgage.

Q. 79. Was new stock issued by this consolidated company?

A. Yes, sir; stock of the New Orleans, St. Louis and Chicago Railroad Company was issued.

Q. 80. And that was the company that was foreclosed and had its property afterwards acquired by the Illinois Central?

A. Yes, sir.

Q. 81. You said that was a foreclosure of a junior mortgage, did you not?

A. Yes, sir; consolidated mortgage.

499 Q. 82. Were there older mortgages remaining on the property?

A. Yes, sir.

Q. 83. What became of them; were they taken care of?

A. They were taken care of.

Q. 84. Were they the same that you have already spoken of?

A. Well, they were to the extent of the mortgage on the Missis-

sippi Central. Of course, there were first and second mortgages on the Jackson road.

Q. 85. When was the Jackson road acquired by the Southern Railroad Association?

A. The Jackson road was never acquired by the Southern Railroad Association.

Q. 86. In whose control was it?

A. It was in the control of the railroad company.

Q. 87. Well, who controlled the railroad company; who were the principal parties in it?

A. At what time, sir?

Q. 88. At the time of the consolidation.

A. Well, Colonel McComb was then the president of the New Orleans, Jackson and Great Northern Railroad Company.

500 Q. 89. Was he a large stockholder in it?

A. I don't know to what extent he held stock.

Q. 90. And that company had also first and second mortgages?

A. Yes, sir; they had first and second mortgages.

Q. 91. Was Colonel McComb a holder of both?

A. I don't know personally.

Q. 92. Was he a holder of bonds of the Southern Railroad Association.

A. The Southern Railroad Association had no bonds.

Q. 93. Well, of the original property—the Missi-ppi Central?

A. Yes; I think he had; I think he had some bonds.

Q. 94. A large quantity of them?

A. At one time he had, I believe; yes, sir.

Q. 95. How large a quantity?

A. Oh, I could not tell you; I could not give you the figures.

A. 96. Several hundred thousand dollars?

A. I believe he had; yes, sir.

Q. 97. At what time was that?

501 A. Well, I suppose—I couldn't give you the years; probably 1872, 1873, or 1874.

Q. 98. Was he a large holder of those bonds at the time of the consolidation?

A. Well, I think he had quite an interest in them.

Q. 99. Did it amount to a million dollars?

A. Oh, no; I don't think it did.

Q. 100. Well, didn't you have occasion to know something in regard to the amount of them?

A. Not of his personal affairs; no, sir.

Q. 101. Wasn't that interest paid by the Southern Railroad Association—the interest on those bonds?

A. Yes, sir; but then——

Q. 102. And you was secretary and treasurer, were you not?

Mr. BANGS: He wanted to qualify his answer. He said "but then" when you interrupted him.

The WITNESS: I wanted to qualify my answer by saying that I knew Colonel McComb held some of the bonds, but there were other

members of his family who had some of the bonds—people in Wilmington.

502 Mr. BANGS: Mr. Wilson's question was whether the interest was paid on those bonds by the Southern Railroad Association.

The WITNESS: Oh, yes, sir; of course the interest was paid.

Q. 103. At the time that you were treasurer?

A. Oh, no; I was not treasurer until after the concern went out of business.

Q. 104. You were not treasurer until after it ceased to have anything in the treasury?

A. Yes, sir; exactly.

Q. 105. To what source, then, did you look for your salary?

A. Well, I had to wait for my salary.

Q. 106. Did you ever get it?

A. I got it finally.

Q. 107. Who paid it?

A. Well, Colonel McComb generously paid it.

Q. 108. When did he do that?

A. Oh, I suppose it must have run two or three years.

Q. 109. Well, when was it that he generously paid it?

503 A. Some time in 1887, I think—1877 or 1878; I can't tell which. I know it was a number of years after the consolidation.

Q. 110. Did this institution keep books?

A. This institution did keep books.

Q. 111. Where were they kept?

A. They were kept in New York here.

Q. 112. Where was the office?

A. 20 Nassau street.

Q. 113. Whose was the office?

A. At what particular time?

Q. 114. Well, at all times.

A. Well, part of the time it was the office of the Southern Railroad Association and then at another period it was the office of the New Orleans, St. Louis & Chicago Railroad Company.

Q. 115. The times corresponding with the changes in the management and control of the lines?

A. Yes, sir.

Q. 116. Well, how long did that office continue to be occupied for this business under one name or another?

A. I think we gave up all semblance of an office in 1877 after the foreclosure proceedings were ended.

504 Q. 117. Well, when was the office itself given up?

A. Well, that is what I say—in 1877.

Q. 118. I mean the rooms—the occupancy of the rooms.

A. Well, I am replying to that. In 1877, as near as I can remember.

Q. 119. Up to that time had the books of the Southern Railroad Association been kept at that place?

A. Well, mostly, I think; yes, sir.

Q. 120. Well, you say "mostly." Why do you qualify your answer?

A. Because they were sent away.

Q. 121. Sent away when and where?

A. They were sent to Wilmington.

Q. 122. In what year?

A. I think that was in 1877.

Q. 123. Well, up to that time had they been kept continuously in this office of which you speak?

A. Yes, sir.

Q. 124. Under your direction?

A. Yes, sir; under my control.

Q. 125. What time in 1877 were they sent to Wilmington—
505 before the office was surrendered?

A. Well, I think about the same time. We wanted to close up the office and we wanted to get rid of the books, and we had to put the books somewhere.

Q. 126. Where did you send them to, Wilmington?

A. Sent them to Col. McComb's place of business.

Q. 127. Where was that at that time?

A. That was on the corner of Third and Orange, in Wilmington.

Q. 128. And this applies, I suppose, as well to papers, vouchers, documents, and letters—everything of that sort——

A. (Interrupting:) Oh, everything belonging to the Southern Railroad Association.

Q. 129. (Continuing:) That would properly be filed away or preserved in the office of the secretary or treasurer?

A. Yes, sir.

Q. 130. Did it make a large quantity of books and papers?

A. Oh, yes, sir; several dry-goods boxes—big dry-goods
506 boxes.

Q. 131. They were sent in that manner by Col. McComb's direction, I suppose?

A. I can't say that he gave any particular direction about it. I took the responsibility of doing it myself. In fact, I think I suggested it.

Q. 132. Since that time has the company had any office so far as you know?

A. No, sir.

By Mr. BANGS:

Q. 133. Mr. Calhoun, were those books of which you have spoken as having been sent to Wilmington at any time in the possession of the sheriff of this city and county?

A. They were for a short period.

Q. 134. On what occasion was that or under what process?

A. It was in the process instituted by Mr. Artemas H. Holmes to recover the value of bonds that were overdue—Mississippi Central bonds.

Q. 135. Can you tell the date of those proceedings?

A. I think they were commenced in May, 1875.

Q. 176. And an attachment was issued?

507 A. Yes, sir.

Q. 137. Do you remember who the plaintiff in that suit was?

A. It was Orrin A. Bills.

Q. 138. And at that time some of the bonds of the Mississippi Central Railroad Company had matured, had they?

A. Yes, sir.

Q. 139. And were those bonds which had been assumed by the Southern Railroad Association?

A. Yes, sir.

Q. 140. And then assumed by the consolidated company?

A. Yes, sir.

Q. 141. Was either company able to pay them when they matured?

(Objected to by Mr. Wilson on same grounds.)

A. No, sir; I think not.

Q. 142. Had they the means of paying them?

(Same objection.)

A. No, sir.

Q. 143. Did the Illinois Central Railroad Company acquire

508 title under foreclosure of a mortgage to secure the bonds of the Mississippi Central Railroad Company, such as Col. McComb held, or under a subsequent mortgage?

A. A subsequent mortgage called the consolidated mortgage.

Q. 144. Do you know the amount of that mortgage?

A. There were $3,500,000, I think, of the Mississippi Central consolidated.

Q. 145. Do you know what the property brought?

A. I don't remember; I don't know what the property brought.

Q. 146. Well, was any surplus left on that foreclosure for the other creditors or for the stockholders of either the Mississippi Central or the Southern Railroad Association or the New Orleans, Jackson and Great Northern or the New Orleans, St. Louis and Chicago?

(Same objection.)

A. No, sir.

Q. 147. Was anything left?

A. No, sir.

Q. 148. What did you sell your stock for, Mr. Calhoun?

A. Let me see; I think I got $7 a share for it.

509 Q. 149. In cash?

A. Yes, sir.

Q. 150. Well, wasn't it $7.50?

A. $7.50. It was.

Q. 151. Well, do you know what ultimately became of Col.

McComb's mortgage bonds which you describe as having been held by him or by some people in Wilmington?

A. What ultimately became of them?

Q. 152. Yes. Did he dispose of them or what; do you know?

A. I don't know what was done with them.

Q. 153. Do you know what he gave for them?

A. Well, some of them I do. He gave the market price for them.

Q. 154. Well, about what?

A. Well, I think it was about in the neighborhood of 80.

Q. 155. Do you know how he paid for them?

A. He paid for them in money.

Q. 156. Did that money go to the Southern Railroad Association?

A. Yes, sir.

510 Q. 157. And they were bought of the Southern Railroad Association, were they not?

A. Yes, sir.

Q. 158. And what did the Southern Railroad Association do with the money they got for them?

A. Well, paid some of their debts.

Q. 159. Appropriated it to the payment of debts, did they not?

A. Yes, sir.

By Mr. WILSON:

Q. 160. What personal knowledge have you in regard to those matters of which you have last spoken?

A. What personal knowledge?

Q. 161. Yes; as to what the road brought, have you any personal knowledge?

A. Oh, no.

Q. 162. As to how much was realized on the bonds, have you any personal knowledge?

A. No, sir; not any personal knowledge.

Q. 163. Now, how many of the bonds you speak of as having been bought by Col. McComb at 80 were so purchased by him—what amount?

511 A. Let me see; I think there were a couple hundred thousand of firsts and a larger amount of seconds—Mississippi Central.

Q. 164. All of those, you say, you know that he paid the cash for?

A. Yes, sir.

Q. 165. At that rate?

A. Yes, sir.

Q. 166. Eighty?

A. Eighty or thereabouts; I think there were two prices, but it was about that.

Q. 167. Did he not acquire a large additional amount of bonds for which he did not pay any cash?

A. I never knew of that fact, sir.

Q. 168. Of any of these roads connected with this transaction?

A. No, sir.

Q. 169. You say you never knew of anything of the sort?
A. I never knew of his acquiring any bonds without paying for them.

Q. 170. Do you know the fact that he did acquire bonds
512 in addition to those that you have mentioned as bought by him at about 80?
A. No, sir; I do not.
Q. 171. You don't know whether he did or not?
A. Well, of course, I don't know whether he did or not, but my belief is he did not.
Q. 172. Well, I was not asking for your belief this time, Mr. Calhoun.
A. Well, all right, sir.
Q. 173. I think you said you did not know whether or not he held bonds in the New Orleans, Jackson and Great Northern railroad?
A. No, sir; I don't know how that was.
Q. 174. Do you know whether he had bonds in the consolidated road?
A. I think he had a few.
Q. 175. Do you know whether or not he sold any of these bonds which he had in any of these roads, or otherwise realized upon them?
A. I don't know of my own personal knowledge. I had npthing to do with his personal transactions.
513 Q. 176. You were not his private secretary in any way then?
A. No, sir.
Q. 177. Did he have a private secretary?
A. Yes, sir.
Q. 178. What was his name?
A. His name was George Moore.
Q. 179. He stayed at Wilmington, I suppose?
A. Yes, sir.
Q. 180. In the office there of Col. McComb?
A. Yes, sir.

By Mr. BANGS:

Q. 181. Mr. Calhoun, upon what basis did you make the statements that you did make about the foreclosure and the purchase by the Illinois Central Railroad Company?
A. Oh, I got a circular from the Illinois Central office—I think Mr. Osborne himself sent it to me—which gave the particulars of the foreclosure.

Mr. WILSON: Well, please don't state its contents.
Mr. BANGS: No, you need not do that; but were you testifying upon the basis of that circular?
The WITNESS: I had that in my mind when I spoke.

Q. 182. Had you information from any other source?
A. Only from common report.

514 Q. 183. It was a matter of notoriety?
A. Yes, sir.
Q. 184. Do you know that the road was taken possession of by the receiver?
A. Oh, yes, sir; I was there.
Q. 185. You were ousted yourself, were you not?
A. Yes, sir; I was the secretary and general accountant of the company.
Q. 186. And you gave up to the receiver?
A. Yes, sir; I did.
Q. 187. And he was Mr. Junius B. Alexander?
A. Yes, sir; Mr. Junius Brutus Alexander.
Q. 188. Now of this city?
A. Yes, sir.
Q. 189. Were you interested in any of the securities yourself?
A. No, sir.
Q. 190. Other than the stock of the Southern Railroad Association?
A. No, sir.
Q. 191. Is it within your knowledge that there was a suit brought against Col. McComb by some party—I forget who; I think
515 by the Chicago, St. Louis and New Orleans Railroad Company under the direction of Mr. Osborne—about those Missi-ppi Central bonds that he held?
A. Yes, sir.
Q. 192. You knew of the pendency of such suit?
A. Yes, sir.
Q. 193. Do you know of its settlement otherwise than by hearsay?
A. That is all.
Q. 194. What is the highest price ever paid, within your personal knowledge, for any stock of the Southern Railroad Association?

(Same objection.)

A. From my personal knowledge I cannot state any price, but I heard 125 was paid.
Q. 195. But within your personal knowledge you know of none?
A. No, sir.
Q. 196. What did you pay for yours?
A. I paid par for mine.
Q. 197. You don't know about any other sale?
A. No, sir.
516 Q. 198. Was there any special inducement to that sale?
A. Yes, sir.
Q. 199. What?
A. Well, there was an assessment levied on the stockholders of the Southern Railroad Association to meet the interest due on the funded coupons maturing on the 1st of August, 1874, which obligation had been issued by the Missi-ppi Central Company, and this was an assessment levied on the stockholders to provide the money to meet those obligations. There were about $400,000 of them.
Q. 200. What did they call those; interest certificates?

A. No. They called them second-mortgage scrip Missi-ppi Central Railroad Company, and where one subscribed he got a bond—a consolidated bond or an income equipment bond. That was an inducement, you know.

Q. 201. That is, where the stockholder subscribed?

A. Yes, sir.

Q. 202. Well, you got Walker's stock?

A. Yes, sir.

Q. 203. And you subscribed?

517 A. Yes, sir.

Q. 204. And got a bond?

A. Yes, sir; and I have got it yet.

Q. 205. How?

A. Got it yet.

Q. 206. Well, you at that time thought that this consolidated bond or the chance of getting it was something worth paying for?

(Objected to as immaterial.)

A. No; I do not.

Q. 207. Well, what was the element of value in the stock to you?

(Objected to as immaterial.)

A. Well, the element of value, of course, was the bond; I looked to the bond.

Q. 208. Well, that is what I mean. Did you ever find a market for that bond?

A. No, sir.

Q. 209. Did you ever try to?

A. Yes, sir.

Q. 210. Never got any income from it?

A. No, sir.

Q. 211. What is its value?

518 A. It hasn't any value; two cents a pound in Ann street.

Q. 212. That is, its only value is as waste paper?

A. Yes, sir.

Q. 213. Do you know of its ever having any more value than that?

A. I don't think it ever had.

Q. 214. Well, was it at that time that there were transfers of the stock, Mr. Calhoun—at the same time that you bought that there were some other transfers?

A. Yes, sir; there were some other transfers.

Q. 215. But do you know the terms or conditions?

A. I do not, sir; the assessment that I spoke of as having been levied upon the stockholders to pay the second-mortgage scrip certificates and for other purposes was forty per cent.

Q. 216. And did you pay the forty per cent.?

A. Yes, sir.

By Mr. WILSON:

Q. 217. That was levied on the stockholders of what corporation?

A. The Southern Railroad Association.

519 Q. 218. And was levied when?

A. It was levied some time early in June, I think. It was before the consolidation.

Q. 219. Of what year?

A. 1874.

By Mr. BANGS:

Q. 220. Was it paid generally?

A. Oh, no, sir. The Pennsylvania Company and a number of other people never paid.

Adjourned to Saturday, April 18th, 3 p. m.

NEW YORK, *May* 2, 1885.

Present: Mr. Wilson, for complainant; Mr. F. N. Bangs, for defendant.

The defendant puts in evidence the following papers:

A mortgage made by the Mississippi Central Railroad Company, dated November 1, 1854, to Charles Butler, Azariah C. Flagg, and Jacob Thompson, as trustees.

Also a mortgage made by the Mississippi Central Railroad
520 Company, dated November 1, 1865, to Jacob S. Rogers, M. P. Mathieson, and William L. Sharkey, as trustees.

Also a copy of the lease of the Mississippi Central Railroad Company to the individuals named in such lease constituting the Southern Railroad Association.

Also mortgage made by the Mississippi Central Railroad Company and the Southern Railroad Association, dated May 1, 1872, for $8,000,000, and mortgage of the same date executed by the New Orleans, Jackson and Great Northern Railroad Company.

Also the master's report, decree of sale, and decree confirming the master's report in an action brought upon these mortgages of May 1, 1872, by the Illinois Central Railroad Company, John Newell, and Junius B. Alexander against the New Orleans, St. Louis and Chicago Railroad Company, the Mississippi Central Railroad Company, and Edgar & Bates.

The complainant objects to each of the above-mentioned papers as immaterial and irrelevant.

The following are copies of such papers:

Mortgages Executed by Mississippi Central Railroad Company to Secure Its First and Second Issue Bonds.

521 Mississippi Central Railroad Company.

First mortgage---------- $1,350,000

This indenture, made this first day of November, in the year of our Lord one thousand eight hundred and fifty-four, between the

Mississippi Central Railroad Company, a corporation duly constituted by the laws of the State of Mississippi, party of the first part, and Charles Butler and Azariah C. Flagg, of the city of New York, and Jacob Thompson, of Lafayette county, and State of Mississippi, parties of the second part.

Whereas, the said party of the first part, in pursuance of the powers conferred by the acts of its incorporation, and by the acts supplementary thereto, and amendatory thereof, is now engaged in constructing a railroad from the town of Canton, in the county of Madison, in said State of Mississippi, to a point in Tippah county, in the said State of Mississippi, on the line dividing the said State of Mississippi from the State of Tennessee, and for that purpose have resolved to raise money as authorized by one or more of the acts above mentioned, to be applied to the construction, com-
522 pletion and equipment of said railroad, and in order to secure the payment thereof, have resolved to execute bonds to an amount not exceeding one million three hundred and fifty thousand dollars, to be numbered from number one (1) to number two thousand and twenty-six (2,026), inclusive, and made payable at the city of New York, as follows: that is to say, numbers one to one hundred and sixty-nine inclusive, and numbers six hundred and seventy-five to one thousand and eleven, inclusive, on the first day of November which will be in the year one thousand eight hundred and sixty-nine; numbers one hundred and seventy to three hundred and thirty-eight, inclusive, and numbers one thousand and twelve to one thousand three hundred and forty-eight, inclusive, on the first day of November which will be in the year one thousand eight hundred and seventy-four; numbers three hundred and thirty-nine to five hundred and six, inclusive, and numbers one thousand three hundred and forty-nine to one thousand six hundred and eighty-seven, inclusive, on the first day of November which will be in the year one thousand eight hundred and seventy-nine; and numbers five
523 hundred and seven to six hundred and seventy-four, inclusive, and numbers one thousand six hundred and eighty-eight to two thousand and twenty-six, inclusive, on the first day of November which will be in the year one thousand eight hundred and eighty-four, with the option on the part of the owner of the bond converting the same into the stock of the company at par at any time before the expiration of five years after said railroad shall be in operation its entire length; all of said bonds to bear interest at the rate of seven per centum per annum, payable, on the surrender of the interest warrants, semi-annually, on each first day of May and November ensuing the date thereof, until the principal shall be fully paid.

Numbers one to six hundred and seventy-four, inclusive, of said bonds are to be of the amount of one thousand dollars each, and numbers six hundred and seventy-five to two thousand and twenty-six, inclusive, of said bonds are to be of five hundred dollars each. Each of said bonds is to have semi-annual interest warrants at-

tached, and shall be authenticated by a certificate signed by
524 said parties of the second part, and are all to be on an equality, so far as regards security for payment thereof by these presents, notwithstanding they may be issued at different times. The bond and certificate to be in the following form, that is to say:

State of Mississippi, Mississippi Central Railroad Company, Mortgage Bond.

Interest at seven per centum per annum, payable semi-annually.

No. —. (Vignette.) $——.

This certifies that the Mississippi Central Railroad Company has received the sum of —— dollars from ——, and in consideration thereof doth hereby promise and agree to pay at the office of said company, in the city of New York, to —— or assigns, the sum of —— dollars on the first day of November, one thousand eight hundred and ——, and also the interest thereon at the rate of seven per centum per annum on the first day of every May and November ensuing the date hereof until said principal sum shall be
525 paid, upon presentation of the annual interest warrants as they severally become due, at the place aforesaid. The holder of this bond may at any time prior to the expiration of five years, after the railroad of the said company shall be in operation its entire length, surrender the same, with the interest warrants not then due annexed hereto, and receive therefor an equal amount of capital stock of said company at its par value. This bond forms part of the sum of one million three hundred and fifty thousand dollars, secured by a mortgage upon the railroad and property of the company aforesaid, executed to Charles Butler and Azariah C. Flagg, of the city of New York, and Jacob Thompson, of Lafayette county, in the State of Mississippi, in trust, and bearing even date herewith.

In witness whereof, the said company has hereto caused to be affixed its corporate seal, and these presents to be subscribed by its president and treasurer, the first day of November, 1854.

—— ——, *President.*

—— ——, *Treasurer.*

526 Now, therefore, this indenture witnesseth, that the said party of the first part, in order to secure the payment of said bonds, and interest, and in consideration of the sum of one dollar to the said party of the first part well and truly paid by the said parties of the second part, at the time of sealing and delivering thereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred and conveyed, and by these presents doth grant, bargain, sell, transfer and convey to the said parties of the second part, and the survivors and survivor of them, and his or their successors in the trust hereby created, and assigns. All the following present and future to be acquired property of the

said party of the first part; that is to say, the railroad of the said party of the first part, constructed or to be constructed, the right of way, the land occupied or procured for the said railroad and way, the bridges, iron rails, superstructure, fences, privileges, rights and real estate owned by the said party of the first part, or which shall hereafter be owned by said party of the first part, and so much of the net income or profits
527 to be had or derived from the same as may be necessary to pay the interest on said bonds, and all the lands used and occupied for depots and stations, and all buildings standing or being thereon, or which shall or may be procured therefore, together with all the locomotives, engines and tenders, passenger cars, freight cars, shops, tools and machinery now owned or which may hereafter be owned by said party of the first part, and in any way belonging or appertaining to the said railroad of said party of the first part, now constructed or to be constructed including all its property, real and personal, and mixed, and all its rights, credits and franchises, excepting, however, from the premises and property above mentioned all such lands and proceeds of sales thereof as have been given or granted, or may hereafter be given or granted to the said party of the first part, or its successors by the States of Mississippi or by the United States of America and excepting also all such lands and proceeds of the sales thereof as may be granted, conveyed or paid, or to which the said party of the first part may be entitled from said State of Mississippi in exchange for or in consideration of the
528 transfer or issue to said State of Mississippi, of any future portions of the capital stock of said company; but nothing herein contained shall be construed to prevent the party of the first part from selling, hypothecating or otherwise disposing of any bonds, notes, or other securities received in payment for stock or otherwise, or of any land or other property of the company not necessary to be retained for *them* railway depot grounds or stations not required for the construction or convenient use of its road, nor from collecting monies due to the said company on stock subscriptions or otherwise, provided said party of the first part shall collect and faithfully apply al- such means to the construction and equipment of its said railroad, or in payment of said bonds, or the interest thereon, and provided also that no default shall have been made in the payment of the interest or principal of any of the above-described bonds.

To have and to hold the said premises and every part thereof unto the said parties of the second part, and the survivors or survivor of them, and his or their successors in the trust hereby created in trust for the person or persons, bodies, politic or corporate,
529 who shall become the holders of said bonds about to be executed as aforesaid, or any of them, subject to the terms and stipulations of said bonds and the provisions of the acts above mentioned, and subject to the possession, control and management of the directors of said company as long as the said company shall well and truly perform all and singular the stipulations of the said bonds and of the covenants of this indenture. And in the case the said party of the first part shall fail to pay the principal or any

part thereof, or any of the interest on any of the said bonds at the time when the same becomes due and payable, according to the tenor thereof, when demanded, then after the expiration of sixty days from such default, upon the written request of the holder of any of the said bonds, the principal or interest of which remains due and unpaid, the said parties of the second part and the survivors or survivor of them and his or their successors in the said trust, may and shall take actual possession of the said railroad and of all and singular the property and effects hereby mortgaged, and in person or through the agency of the persons they may from time to time appoint, shall receive the income, earnings and profits of said railroad, and shall appropriate the income, earnings and
530 profits first to the payment of the necessary expenses of keeping said road and engines, locomotives, tenders, cars and other appertenances in repair and of conducting the business of said road in an efficient manner, including all salaries or compensation of officers and employees of said company of every description, whether due at the time of taking such possession or falling due thereafter, and the surplus if any there be*m* shall be paid from time to time *pro rata* to the holder or holders of any said bonds the principal or interest of which may be in whole or in part unpaid, whether the same shall fall due prior or subsequent to the taking possession by the said parties of the second part until the whole amount due them shall be fully paid thereon, when the said premises shall be delivered up to said party of the first part, or its legal representatives, or the said parties of the second part and the survivors and survivor of them, and his or their successors, in the said trust at his or their discretion, may or on the written request of the holders of at least one-half of the said bonds in amount then unpaid, whether due or otherwise, shall cause the said premises, or so much thereof as
531 may be necessary to pay and discharge the principal and interest of such of said bonds as may then be unpaid, whether due or otherwise, as aforesaid, to be sold at public auction in the city of New Orleans, in the State of Louisiana, and shall execute to the purchaser or purchasers thereof a good and sufficient conveyance in fee simple for the same, which shall be a bar against the party of the first part, its successors and assigns, and all persons claiming under them, of all right, interest or claim in or to said premises, sold, and said parties of the second part shall, out of the proceeds of said sale, pay first, the costs and expenses of such sale, and next, whatsoever may be unpaid or any of said bond or bonds, whether due or otherwise, if the proceeds of such sale shall be sufficient to pay the same in full, and the remainder if any, shall be paid to the said party of the first part, or its legal representatives, but if such proceeds of sale shall not be sufficient to pay such bonds, whether due or otherwise in full, then the same shall be divided *pro rata* among the holders of such bonds, whether due or otherwise; but before any such sale shall take place the said trustees shall give notice of the time, place and terms of sale, and of
532 the specific property to be sold, by advertisement published for six months in two newspaper- of general circulation pub-

lished daily respectively in each of the cities of New York, New Orleans and Jackson in the said State of Mississippi, it being expressly understood that in no case shall any claim or advantage be taken of any valuation, appraisement or extension laws by the said party of the first part, and that no injunction or stay of proceedings or other process, shall be applied for or obtained by said party of the first part to prevent such entry of sale as aforesaid, and it is understood and agreed by and between the parties to these presents that if at any time after said parties of the second part or the survivors or survivor of them, or his or their successors, shall have taken possession of the property aforesaid, or any part thereof, or shall have advertised the same for sale, the said party of the first part, or its successors or assigns, shall, before any sale shall have taken place, pay and satisfy all such sum or sums due upon such of said bonds as it shall have made default in paying with interest and all costs and expenses consequent on such default, then all such proceedings by said trustees shall cease, and said party of the
533 first part shall be restored to the full possession, use and enjoyment of its aforesaid property.

And the said party of the first part for itself and its successors and assigns, doth hereby covenant with the said parties of the second part, their successors or assigns, that the money loaned on said bonds shall be applied in good faith to the completing the said railroad, or to the purchase of materials and equipments therefor, and further to make, execute and deliver all and singular, such further assurances and instruments as shall from time to time be necessary, and as said parties of the second part, or the survivors or survivor of them, or his or their successors, or their counsel learned in the law, shall reasonably advise or require for the better effectuating the objects and purposes of these presents, and of making them embrace at law the said railroad, as the same may be extended and the property and effects so expressed to be mortgaged or so intended to be, and to be hereafter acquired. And it is also further mutually agreed that the said parties of the second part and their successors in said trust shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of
534 any agent employed by them when such agent shall be selected or employed with reasonable discretion, and that the said parties of the second part and their successors in said trust shall be entitled to receive reasonable compensation for every labor or service performed by them in the discharge of their said trust in case they shall be compelled to take possession of said premises or any part thereof, or manage the same and in case of the death, mental incapacity or resignation of either one or more of the said parties of the second part or their successors, the said party of the first part and the surviving, remaining or acting trustee or trustees shall select a new trustee to supply the vacancy or vacancies thereby created, and shall make, execute and deliver to the trustee or trustees so selected, all and singular such further instruments and assurances as may be requisite to enable the trustee or trustees thus sslected, to execute with the others the said trust, and so on, from time to time,

and all the estate, right, interest, power and control of the trustee who shall die, resign or become mentally incapacitated shall be divested, cease and determine. And in case of the death, mental
535 incapacity or resignation of all of *of* said parties of the second part, or their successors, all their estate, right, interest, power and control in the premises shall be divested cease and determine, and the said party of the first part shall on its default for sixty days take proceedings, therefor, the holders of a majority of said bonds in amount may apply to the chief justice of the high court of errors and appeals of the State of Mississippi, to appoint new trustees, two of whom shall be residents of the city of New York, and one of whom shall be a resident of the State of Mississippi, to supply their places, and thereupon such new trustees shall become invested with all the rights and interests hereby conveyed to or vested in the said trustees of the second part, without any assurance or conveyance for the same, but if the same be necessary, both or either of the parties hereto shall execute any necessary releases or conveyances for that purpose.

And it is hereby mutually agreed by and between the parties hereto, and these presents are upon this express condition that on the payment or satisfaction of the principal and interest of said bonds, or the conversion thereof into the capital stock of said
536 railroad company, in the manner above mentioned the estate hereby granted to the said parties of the second part shall be void and the premises hereby granted shall immediately revert to and be reinvested in law and in fact in the said company without any acknowledgement of satisfaction, reconveyance, re-entry, or other act. And the parties of the second part respectively, covenant with the said party of the first part, its successors and assigns, to faithfully perform and fulfill the trust herein created.

In witness whereof, the party of the first part, has caused its corporate seal to be hereunto affixed, and the same to be subscribed by its president, and the said parties of the second part have set their hands and seals the day and year first above written.

W. GOODMAN, *President.* [L. S.]
CHARLES BUTLER. [L. S.]
A. C. FLAGG. [L. S.]
J. THOMPSON. [L. S.]

Signed, sealed and delivered in the presence of—
JOHN BISSELL,
By Messrs. Butler & Flagg, and
H. GREEN,
As to Chas. Butler, and A. C. Flagg.

Recorded 25th December, 1855.

537 Mississippi Central Railroad Company.

Second mortgage $2,000,000.00.

This indenture, made and entered into this the first day of November, one thousand eight hundred and sixty-five, between the

Mississippi Central Railroad Company, a corporation duly constituted by the laws of the State of Mississippi, party of the first part, and Jacob S. Rogers, of the State of New York; M. P. Mathison, of the State of South Carolina, and William L. Sharkey, of the State of Mississippi, parties of the second part, witnesseth:

Whereas, the party of the first part did, on the first day of November, 1854, execute to Charles Butler, Azariah C. Flagg and Jacob Thompson, a first mortgage on the property and effects of the said railroad company, to secure the payment of thirteen hundred and fifty thousand dollars of seven per cent. bonds, also embracing so much of the net annual income of profits of said company as should be necessary to pay the interest on said bonds, and the sum of forty thousand dollars yearly to a sinking fund for their redemption, said first mortgage constituting the first lien on all that part of said company's road between the town of Canton and
538 the line dividing the State of Mississippi and Tennessee, with the equipments thereon, and a second mortgage on that part of the road and equipments in the limits of the State of Tennessee.

And whereas, the State of Tennessee advanced to said company five hundred and seventy-four thousand dollars of its six per cent bonds to aid in constructing that part of said company's road between the northern boundary of the State of Mississippi and the city of Jackson, in Madison county, Tennessee, which bonds constitute a first lien upon that part of said company's road and equipments within the State of Tennessee.

And whereas the party of the first part, in pursuance of the authority and powers conferred by the act of its corporation, and by acts supplemental thereto and amendatory of, have determined by resolutions of the stockholders adopted at their annual meeting the 4th day of October, 1865 and resolutions adopted by the board of directors at their meeting on the 5th day of October, 1865, to raise money by an insurance and sale of the company's bonds, for the purpose of aiding in the payment of outstanding claims against said company, or to exchange the same for any outstanding
539 claim or income or other bonds, and to secure the payment of the bonds with the interest thereon, so authorized to be issued, by second mortgage upon all the property, effects and franchises of said company, as authorized by one or more of the legislative acts above mentioned, subject however, to the prior claim and lien of said first-mortgage bonds. said bonds advanced by the State of Tennessee, said annual appropriation of forty thousand dollars to the sinking fund aforesaid, and two per cent. on the par of the said bonds issued by the State of Tennessee as a sinking fund for their payment.

The proceeds of the sale of said bonds, or said bonds themselves, to be applied to the objects above indicated. Said bonds not to exceed two million dollars in aggregate amount and to be numbered from number one (1) to three thousand five hundred (3,500), both inclusive; number one to thirteen hundred, both inclusive, to be of the denomination of one thousand dollars; number thirteen hundred and one to twenty-five hundred, both inclusive, to be of the

denomination of five hundred dollars; number twenty-five hundred and one to thirty-five hundred, both inclusive, to be of the
540 denomination of one hundred dollars. Said bonds to bear date of the first (1st) February, 1866, and to be payable on the 1st February, 1886, signed by the president and countersigned by the treasurer of the said company, to be payable in the city of New Orleans, Louisiana;

Provided, however, that the principal and interest of said bonds may be made payable at any other time and place than those designated on the face of said bonds, by an endorsement made on said bonds by the president of said company, naming the time and place of payment of the principal and interest thereof; all of said bonds to have forty interest warrants attached thereto, unless the president shall by his endorsement designate a period less than twenty years for payment, when said warrants shall equal two for each year that said bond has to run to maturity. All of the said bonds are to be on an equality so far as regards security for the payment thereof. The funded debt of said company is not to be increased after the issuance of said bonds by any other issuance of bonds without the assent of the majority in amount of all the creditors of said company, so long as the whole funded debt of the company shall exceed in amount one million five hundred thousand dollars,
541 said bonds and certificates to be in form following, viz:

STATE OF MISSISSIPPI:

Mississippi Central Railroad Company—Second-Mortgage Bond.

Interest at eight per centum per annum, payable semi-annually.

No. —. $1,000.

This certifies that the Mississippi Central Railroad Company has received the cum of one thousand dollars from —— ——, and in consideration thereof doth hereby promise and agree to pay at the office of said company in the city of New Orleans, La., to —— —— or bearer, the said sum of one thousand dollars on the first day of February eighteen hundred and eighty-six, and also interest thereon at the rate of eight per centum per annum on the first day of every August, and February ensuing the date hereof, until said principal sum shall be paid upon presentation of annexed interest warrants as they severally become due and payable at the place aforesaid.

Provided, however, that the president of said company may, by endorsement on the bonds, direct a different time and place of
542 payment of the principal and interest thereof, naming the time and place of payment, which endorsement shall control the payment thereof as to principal and interest.

This bond forms part of the sum of two million dollars secured by second mortgage executed to Jacob S. Rogers, of the State of New York; M. P. Mathison, of the State of South Carolina, and William L. Sharkey of the State of Mississippi, in trust, and of date 1st day of February, 1866, upon the railroad and all the effects and

franchises of the company aforesaid, and so much of its yearly net revenue as may not be necessary to pay the interest on one million three hundred and fifty thousand dollars of the first-mortgage bonds of the company. The amount of forty thousand dollars annually to the sinking fund for the redemption of the same, and the additional sum necessary to pay the interest on five hundred and seventy-four thousand dollars of six per cent. bonds of the State of Tennessee, and two per cent. on the par of said bonds annually, as a sinking fund for their redemption. The funded debt of the company is not to be hereafter increased by any additional issuance of bonds, without the assent of a majority in amount of all the creditors of said
543 company, so long as the whole funded debt of the company shall exceed one million five hundred thousand dollars.

In witness whereof the said company has hereunto caused to be affixed its corporate seal and these presents to be subscribed by its president and treasurer, this the first day of February, 1866.

[SEAL.] —— ——, *President.*
—— ——, *Treasurer.*

Endorsed by trustees:

STATE OF MISSISSIPPI:

Mississippi Central Railroad Company—Second-Mortgage Bond.

$1,000. No. —.

Dated 1st February, 1866.
Payable 1st February 1886.
Interest at eight per cent., payable 1st February and August.

We, Jacob S. Rogers, M. P. Mathison, and William L. Sharkey, trustees, &c., do hereby certify that the within written bond
544 is one of a series of bonds issued and to be issued to an aggregate amount not exceeding two millions of dollars, made by the Mississippi Central Railroad Company, and secured by a second mortgage to us as trustees, on the franchises, property &c., of said company.
Dated 1st February 1866.

—— ——,
—— ——, } *Trustees.*
—— ——,

Endorsement by president:

The State of Mississippi — day of ——, 1866.
This bond, with its coupons, is, by virtue of the resolutions of the stockholders and the board of directors authorizing its issuance and by this endorsement hereby made payable at —— and the said bond due and payable on the — day of ——

—— ——,
President Miss. C. R. R. Co.

Now, therefore, this indenture witnesseth:

545 That the said party of the first part in order to secure the payment of the said bonds and the interest thereon, and in consideration of the sum of ten dollars paid by the parties of the second part to the party of the first part at the time of the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold transferred and conveyed, and by these presents doth grant, bargain, sell transfer and convey to the parties of the second part, the survivor or survivors of them, or his or their successors, all the present and future to be acquired property, effects and franchises of the party of the first part. That is to say, the railroad of said company and its appendages, the right of way, the bridges, iron rails, the superstructure, depot grounds and buildings being thereon, the locomotive engines and tenders, passenger, freight and other cars, shops of all kinds, tools and machinery now owned or that hereafter may be owned by the party of the first part, together with all the property of the party of the first part, real, personal or mixed, and all its rights, credits, and franchises, excepting therefrom so much of the net annual income, or profits to be had or derived from said railroad, its equipments or appendages as

546 may be necessary to pay the interest on thirteen hundred and fifty thousand dollars on the first-mortgage seven per cent. coupon bonds of said railroad company, the amount of forty thousand dollars to be paid yearly to the sinking fund for the redemption of said bonds, and excepting from said yearly net income an amount sufficient to pay the interest on five hundred and seventy-four thousand dollars of the six per cent. bonds of the State of Tennessee, and the amount of two per centum on the par of said bonds, payable to said State annually as a sinking fund for their redemption.

From the residue of the yearly net income there shall be paid the semi-annual interest on the second-mortgage bonds, and three per cent. of the aggregate amount of said bonds disposed of or sold shall be appropriated to a sinking fund for their redemption, which shall be invested annually in the purchase of such bonds as can be obtained at the lowest rate by first giving public notice of the amount to be invested, and when so purchased shall be cancelled and placed in the hands of the trustees.

The denomination and numbers of the bonds so cancelled shall be made public by an advertisement in at least one newspaper

547 published in the cities of New Orleans, Charleston and New York.

But nothing herein contained shall be so construed as to prevent the party of the first part from selling, hypothecating or otherwise disposing of any bonds, notes or other securities now belonging to said party or which may hereafter belong to it, nor from collecting incomes due or to become due to said party: Provided, however, that said party of the first part shall apply all such means to the payment of the principal and interest of the bonds herein described, or to the principal or interest of any debt heretofore contracted.

To have and to hold the said premises and every part thereof unto the parties of the second part, their survivor or survivors and suc-

cessors. In trust nevertheless for the benefit of the person or persons, bodies corporate or politic, who shall become the holder or holders of any of said bonds to be executed as aforesaid subject to the terms and stipulations of said bonds, and the provisions of the mortgage and the laws above mentioned; subject, however, to the possession, control and management of the board of directors of said company as long as said company shall well and truly
548 perform all and singular the stipulations of said bonds and the covenant of this indenture.

In the event *of* the said parties of the first part shall neglect or refuse to pay the principal or any part thereof, or any of the interest on any of said bonds at any time when the same becomes due or payable, according to the tenor thereof, if demanded, then after the expiration of ninety days from the time of such default, upon the written request of the holder or holders of four hundred thousand dollars of said bonds, the principal or interest of which remains due or unpaid, the said parties of the second part, and the survivor or survivors and his and their successors in the said trust may take possession of the said railroad and all and singular the property hereby mortgaged, and in person or through the agency of such person or persons as they may from time to time appoint, shall receive the income, earnings and profits of said railroad, and shall appropriate the said income, earnings and profits, first, to the payment of necessary expenses of keeping said road, its equipment and appurtenances in repair, and of conducting the business of the
549 road in an efficient manner. Next, to the discharge of any lien above mentioned prior in time to this, and the residue, if any there be, shall be paid *pro rata* from time to time to the holder or holders of any of said bonds, the principal or interest of which may be in whole or in part unpaid, the same being due prior or becoming due subsequent to the taking possession by the parties of the second part until the whole amounts due thereon shall be fully paid, when the premises shall be delivered up to the party of the first part or its legal representatives. Or the said parties of the second part, their survivor or survivors, and his or their successors in said trust, on the written request of the holder or holders of at least two-thirds in amount of said bonds then unpaid or due, shall cause the said premises or so much thereof as may be necessary to pay or discharge the principal and interest of said bonds as may then be unpaid or due, to be sold at public auction in the city of New Orleans, Louisiana, to the highest bidder for cash, and shall execute to the purchaser or purchasers thereof a good and appropriate conveyance therefor in fee simple. The said conveyance shall be a bar against the party of the first part, its successors or
550 assigns, but shall not prejudice any prior acquired before the execution of this mortgage in favor of any creditor of said railroad company.

The parties of the second part shall, out of the proceeds of said sale, pay, first, all cost and expense thereof, next, all salaries or compensation of, officers, agents and employees of said company of every description then due, next, whatsoever may be unpaid on any of said

bonds due or otherwise, if the proceeds of such sale shall be sufficient to pay the same in full, and the remainder, if any, shall be paid to the party of the first part or its legal representatives. But if the same shall not be sufficient to pay all of said bonds in full, due or not due, then the same shall be divided *pro rata* among the holders thereof.

Before any such sale shall take place the said parties of the second part shall give notice of the time, place and terms of sale, and of the specific property to be sold, by advertisement published for six months in two newspapers in general circulation, and published daily, if such thereby, in each of the cities of New Orleans, La.; Charleston, S. C.; New York, N. Y., and Jackson, Miss.

It is understood and agreed by and between the parties
551 to these presents that if at any time after said parties of the second part shall have taken possession of the property aforesaid or any part thereof, or shall have advertised the same for sale, the said party of the first part or its successors or assigns, shall, before any sale has taken place, pay or satisfy all such sum or sums due on such bonds on which default has been made, with all costs and expenses consequent on such default, then all further proceedings by said trustees shall cease, and said party of the first part shall be restored to the full possession, use and enjoyment of its aforesaid property.

And it is further mutually agreed, that said parties of the second part and their successors in said trust, shall only be accountable for reasonable diligence in the management of said property should they take possession of the same, and shall not be responsible for the acts of any agent employed by them when such agent shall be selected or employed with reasonable discretion, and the said parties of the second part and their successors shall be entitled to receive reasonable compensation for services performed in the discharge of their trust in the event they shall be compelled to take charge of said premises and manage or sell the same. In the case of the death, in-
552 capacity or resignation of either one or more of the parties of the second part of his or their successors, or the refusal to act as trustee on the part of the said parties of the second part or such successor, the said party of the first part, from time to time, as either emergency before specified may arise, shall supply such vacancy or the place of the person refusing to act, and the trustee or trustees so selected shall possess and enjoy by his or their predecessor, and all the estate, right and interest, power and control of the trustee who shall die, resign, become incapacitated or refuse to act, shall be divested, cease and terminate. Should the party of the first part neglect for ninety days after the occurrence of a vacancy in the number of trustees, or the refusal of any successor to act, to select some suitable person to supply such vacancy, or a successor to a trustee refusing to act, then the holders of a majority of said bonds, in amount may apply to the chief jnstice of the high court of errors and appeals of the State of Mississippi to appoint a trustee or trustees to fill such vacancy, and any trustee thus appointed shall become vested
553 with the same right and interest hereby conveyed to or vested

in the said parties of the second part without any assurance or reconveyance of the same; but if the same be necessary, both or either of the parties hereto shall execute any necessary release or conveyance for that purpose. And it is further agreed by and between the parties hereto, and these presents are granted upon this condition; that on payment or satisfaction of the principal and interest of said bonds, the estate hereby granted to the parties of the second part shall be void and the premises hereby granted shall immediately revert to and be reinstated in law and in fact in the said company without any acknowledgement of satisfaction, reconveyance, re-entry, or other act; and the said parties of the second part respectively covenant with the party of the first part, its successors or assigns, to faithfully perform and fulfill the trust herein created.

In witness where-, the party of the first part has caused its corporate seal to be hereunto affixed and the same to be signed by its president.

And the said parties of the second part have set their hands
554 and seals the day and year first above written.

Before execution on sixth page "three" erased and "two" inserted. On tenth page "and placed in the hands of the trustees" interlined. On seventeenth page, "all" erased and "same" interlined.

A. M. WEST, *President.*

Attest: W. F. MASON, as to—

J. S. ROGERS, [SEAL.]
W. L. SHARKEY, [SEAL.]
M. P. MATHISON, [SEAL.]

Lease of Mississippi Central Railroad Company to Southern Railroad Association.

Lease.

This indenture, made this, the twenty-fifth day of June,
555 A. D. 1868, by and between the Mississippi Central Railroad Company, a body corporate and politic, existing under and by virtue of the laws of the State of Mississippi and Tennessee, party of the first part, and Henry S. McComb, of Wilmington, Delaware; Sam. Tate, of Memphis, Tennessee; Josiah Bardwell, of Boston, Massachusetts; Eben D. Jordan, and Charles H. Lumbard, also of Boston, Massachusetts; H. Winthrop Gray, Cyrus H. McCormick and Junius B. Alexander, of New York; John L. King, of Springfield, Massachusetts; Horatio D. Newcomb, of Louisville, Kentucky; Samuel M. Felton, of Delaware county, Pennsylvania; and Henry Lewis, of Philadelphia, Pennsylvania, parties of the second part, contracting and doing business under the name and style of the Southern Railroad Association, witnesseth:

First.—That the said party of the first part for and in consideration of the rents, and covenants, hereinafter reserved and contained on the part of the parties of the second part, their executors, administrators and assigns, to be kept and performed, hath granted, demised

and to farm-let unto the said parties of the second part, their
556 executors, administrators and assigns, the whole of the railroad of the party of the first part, extending from Canton, in the State of Mississippi, to Jackson, in the State of Tennessee, with all the branches, extensions, latterals, lands, railways, rails, bridges, fences, rights of way, depots, stations, water stations, station-houses, machine shops, machinery, fixtures and all other buildings, improvements, tenements, and hereditaments of every nature whatsoever, held, owned or which may at any time hereafter, during the term of this lease, be acquired by the said party of the first part, as appurtenant to the said railroad or for use in connection therewith, also all the engines (stationary and locomotives), cars, tenders and other rolling stock, tools, implements and apparatus belonging to the party of the first part, and used or intended to be used in operating or maintaining the said railroad or its appurtenances, also the full right, liberty and privilege of cutting and taking from the lands of the said party of the first part or persons wherever the said party of the first part has such right whatever wood may be required for crossties or as material for any other part of the structure of said railroad or appurtenances, or for consumption as fuel thereon, and also
557 the exclusive right to engage in the business of transporting the mail, passengers and freight on the said railroad, its branches, extensions and laterals at such rates and charges for toll, transportation and other services therewith connected, as the said parties of the second part may from time to time establish, to collect and receive, for their own use, the said rates and tolls, and to have, use, exercise, and enjoy all the rights, powers and privileges which can be lawfully exercised or enjoyed in or about the said railroad and other demised premises, and the management, control and operation of the same, as fully, amply and entirely as the same might, or could have been used, exercised or enjoyed by the said party of the first part, had this indenture not been made, to have and to hold the said railroad and appurtenances, real and personal estate, rights, liberties and privileges hereby granted or intended so to be unto the said parties of the second part, their executors, administrators and assigns for the full term of sixteen years from the first day of September, A. D. 1868, yielding and paying therefor unto the said party of the first part, the yearly rent of one dollar per year.

558 Second.—That the said party of the first part does hereby sell, assign, transfer and set over unto the said parties of the second part, their executors, administrators and assigns, all notes, bills, bonds, obligations, debts, accounts, claims for damages or on other accounts and choses in action whatever, belonging to the party of the first part, and due to them from any person or persons whatever, and also all the old iron, old tools, the materials and other personal property of the party of the first part, not hereinbefore demised, included in the schedule hereto annexed marked "Exhibit A," to have and to hold the same unto the said parties of the second part, their executors, administrators and assigns to and for their own use and behoof forever.

Third.—That the party of the first part shall and will immedi-

ately upon the execution and delivery of these presents, issue and deliver to the parties of the second part, bonds to such amount as may be yet lawfully issued under the first and second mortgages heretofore executed by the party of the first part in addition to those heretofore issued under the said mortgages and now outstand-
559 ing in the hands of third parties, which bonds when so issued shall be in all respects and to the fullest extent therein expressed valid obligations in the hands of the said parties of the second part, and shall be their absolute property, to be disposed of as they may think fit.

Fourth.—That the said parties of the second part shall and will pay and discharge the following debts, obligations of the party of the first part, when and as the same mature, and on payment being demanded from the parties of the second part by the person or persons thereto entitled, it being understood, however, that the parties of the second part may avail themselves of any agreement made by the holders of bonds or obligations of the said party of the first part to postpone the payment of either principal or interest, to wit: The principal of the first-mortgage bonds of the said party of the first part now outstanding in the hands of third parties, not exceeding in amount of principal the sum of one million two hundred and forty-six thousand dollars ($1,246,000), together with all interest maturing or growing due thereon after the first day of May,
560 1868, the bonds to be issued to the parties of the second part hereunder amounting to one hundred and four thousand dollars ($104,000), not being included.

2d. The principal of the second-mortgage bonds now outstanding in the hands of third parties, not exceeding in amount of principal the sum of one million five hundred and forty thousand dollars (1,540,000), together with all interest maturing or growing due thereon after the first day of May, 1868, the bonds to be issued to the parties of the second part hereunder not being included.

3d. The principal of the income bonds of the party of the first part, now outstanding in the hands of third parties, not exceeding in amount of principal the sum of five thousand dollars ($5,000), together with all interest maturing or growing due thereon after the first day of May, 1868.

4th. The principal of the mortgage bonds issued by the Mississippi Central and Tennessee Railroad Company now outstanding in the hands of third parties and overdue, not exceeding in amount of principal twenty-eight thousand dollars ($28,000), together with interest on that amount of principal from and after the first day of May, 1868.

561 5th. The interest accruing during the term of this lease on the bonds to be issued under the first and second mortgages by the party of the first part, to the parties of the second part, as hereinbefore provided.

6th. The interest, as it shall from time to time mature during the hereinbefore-mentioned term of this lease, in bonds issued by the State of Tennessee to the said party of the first part, the said bonds maturing partly in the year 1886, and partly in the year 1892, the

principal of said bonds not exceeding in amount the sum of one million two hundred and seventy-nine thousand dollars (1,279,000).

7th. Other existing indebtedness of the said party of the first part (including interest now due on the aforesaid bonds of the party of the first part, as well as those ascertained as those not yet ascertained by judgment or otherwise) to the amount of eight hundred and fifty thousand dollars ($850,000), should said indebtedness amount to so much. Provided, however, that if the said indebtedness shall exceed that sum, the said parties of the second part shall pay the excess, and the said party of the first part shall refund to the said parties of the second part the excess thus paid, with
562 interest at eight per cent., at the expiration of the term of this lease. The indebtedness embraced in the seventh clause in this article of the indenture, so far as the same has been adjusted by the party of the first part, is itemized and named in the schedule hereto attached, marked "Exhibit B," and specified under — numbered one or class numbered two, and the party of the first part, will, from time to time, as the unliquidated claims intended to be embraced in this article shall be ascertained and adjusted, deliver to the party of the second part a complete list of the same, which list shall embrace the name of each creditor, his residence, if known; the amount of the debt, and when due and payable, and shall be added to class number two in said schedule. And the parties of the second part covenant and agree to and with the party of the first part, that they, the parties of the second part, on the execution of these presents, will place to the credit of the party of the first part, at such place or in such limits as it may designate, within the United States, five hundred thousand dollars (500,000), to be drawn out on the order of the president of the corporation, which is the party of the first part, and used exclusively, and as soon
563 as conveniently can be, for the payment of the debts so mentioned and specified in said class numbered one in said Schedule "B," and will also deliver to the party of the first part the mortgage bonds of the party of the first part to the like amount of five hundred thousand dollars ($500,000), with the coupons for interest attached to said bonds, maturing after the execution of these presents, to be held and possessed by the party of the first part, solely and exclusively as security for the faithful performance by the parties of the second part of each and every promise, agreement and covenant stipulated to be kept, observed and performed in this indenture named by the parties of the second part.

It is understood and agreed that the coupons for interest upon the bonds in the hands of the party of the first part, and held as security for the performance of the covenants of the parties of the second part, shall be detached from the bond and cancelled as fast as the interest becomes due and payable, and that when the said bonds shall be returned to the parties of the second part they shall be so returned without any right to recover interest upon them, except what may afterwards accure. It is further agreed that the
564 coupons for the interest which the parties of the second part are bound by this agreement to pay on bonds of the party of

the first part outstanding in the hands of third parties, shall be delivered up to the party of the first part and cancelled as fast as paid by the parties of second part. Each party shall preserve and when necessary, furnish to the other the proper evidence of the payment and satisfaction of any indebtedness, including interest upon bonds which may be so paid or satisfied by said party, and which is herein agreed to be cancelled when paid.

Fifth.—The said parties of the second part shall, during the term of this lease, provide and pay in the sinking fund for the aforesaid bond of the State of Tennessee, required by the laws of the State of Tennessee to be provided and paid in by the party of the first part; and the parties of the second part shall be released from the payment of a corresponding amount of the mortgage bonds of the party of the first part which may mature after the expiration of said term, and the parties of the second part shall pay all taxes that may be lawfully assessed during the term of this lease on the railroad and other estate hereby demised, and upon the earnings, receipts
565 and profits from the business thereon, and shall idemnify and save harmless the party of the first part against all suits or prosecutions that may be brought or instituted against the party of the first part, or any liability or default incurred by the party of the first part during said term occasioned by the parties of the second part, or incurred by reason of their use of the property herein granted.

Sixth.—That the said parties of the second part shall and will purchase all now outstanding shares of stock of the party of the first part which may be offered to them, or their agents, within the period of thirty days from the date of this lease at the rate of five dollars per share.

Seventh.—That the said parties of the second part shall and will at all times during the term of this lease, keep the said railroad of the party of the first part in efficient operation between Canton, Mississippi and Jackson, Tennessee, for the transportation of passengers, the mails, baggage and freight, and shall and will in the conduct and management of said railroad conform in all respects to the charter obligations of the said party of the first part and the laws of the State of Mississippi and Tennessee when the same are
566 applicable; that they shall and will provide and keep properly furnished at a convenient point in the line of said railroad sufficient office room for the keeping of the transfer and other books of the said party of the first part, and for holding such meetings and transacting such business as may be required to keep up and maintain the corporate organization of the party of the first part, and shall and will annually appropriate such sum, not exceeding twenty thousand dollars per annum, as the board of directors of the said party of the first part may require for the payment of such officers and agents as may be appointed by the said board of directors to preserve the organization of the said party of the first part and to protect its interest; provided, however, for any sum thus appropriated and paid by the parties of the second part over and above the sum of eight thousand dollars in any one year, shall be

charged against the said party of the first part, and shall be repaid to the parties of the second part with interest from the date of payment, at the rate of eight per cent. per annum.

Eighth.—That the privilege of free passage over the railroad hereby demised, to the extent that the same is now enjoyed by
567 the directors and officers of the party of the first part shall not be restricted during the term of this lease, and stockholders of the party of the first part shall be passed free over the said road going to or returning from the regular or called meetings of the stockholders.

Ninth.—That the railroad, real and personal estate hereby demised to the parties of the second part, shall be inventoried and appraised in detail at their then cash value in gold coin of the United States, immediately after the execution of these presents, by three disinterested appraisers, one to be chosen by the party of the first part, another by the parties of the second part and the third by two thus chosen; that duplicate copies of the inventory and of the appraisement agreed upon by said appraisers, or any two of them, should the three not agree, shall be signed by said appraisers so agreeing, and one copy thereof be delivered to the said party of the first part, and the other copy to the parties of the second part; that immediately before the expiration of the term hereby demised, the said railroad and real estate and all reasonably proper additions and permanent improvements made thereto or thereon, by said
568 parties of the second part, with the consent of the board of directors of the party of the first part, and all rolling stock, machinery, tools, implements and apparatus, and other personal estate then in use in operating the said railroad, and its appurtenances and reasonably required and proper for that purpose shall be inventoried and appraised in detail at their then cash value in gold coin of the United States, by three appraisers to be then selected in manner aforesaid, and the inventory then made and the appraisement agreed upon by the said three appraisers, or by any two of them, should the three not agree, shall be executed in duplicate by the appraisers agreeing thereto, and one copy of the same shall be delivered to the said party of the first part, and another copy to the said parties of the second part, and if the sum total of the former appraisement shall exceed the sum of the latter appraisement, then the difference between the said sum- shall be paid by the parties of the second part to the party of the first part, but if the sum total of the latter appraisement shall exceed that of the former, then the difference between the said sums shall be paid by the party of the first part to the parties of the second part, the payment in
569 either case to be made in gold coin of the United States or its equivalent, it being distinctly understood and agreed, that the parties of the second part shall have the right to expend whatever sums may be reasonably required to keep the said railroad and demised premises, such new rolling stock, tools, implements or apparatus as may be required to replace that which is worn out, or to transact efficiently the business of the said railroad, and that such rolling stock, tools, implements or apparatus so purchased, shall be

included in the said appraisement to be made immediately before the expiration of the said term, as hereinbefore provided.

Tenth.—That the said parties of the second part shall at the expiration of the term of this lease surrender to the party of the first part peaceable possession of the hereby demised premises, and also of all rolling stock, tools, implements and apparatus then in use in operating the said railroad, which shall have been acquired as aforesaid by the parties of the second part after the date of the execution of these presents; provided, that the party of the first part shall then pay to the parties of the second part; their executors, administrators or assigns, whatever sum of money, if any,
570 shall then be due to them under each and every provision of this agreement, but the said parties of the second part may retain possession of the said demised premises and the appurtenances, and hold the same and every part thereof as mortgagees in possession with full power and authority to work and operate the same, until the sum due, with interest at the rate of eight per cent. per annum shall have been fully paid and discharged; and the party of the first part does hereby in consideration of the premises and of the sum of one dollar paid by the said parties of the second part, the receipt of which is hereby acknowledged, grant, bargain, sell and convey the hereby demised premises to the parties of the second part.

To have and to hold to them, their heirs, executors, administrators and assigns, to and for their own proper use and behoof forever, from and after the expiration of the hereby demised term, until the said sum, if any, due to the said parties of the second part, with interest at the rate of eight per cent. per annum shall have been fully paid and discharged, but no longer. And the rents and profits of said property at fair and reasonable rates as
571 the same accrue, shall be applied to the payment of said sum and interest, and the said parties of the second part shall and will not in any event, institute any proceeding to foreclose the equity of redemption of said party of the first part before the first day of January, A. D. 1890.

Eleventh.—That the said party of the first part covenants, promises and agrees to and with the parties of the second part, their executors, administrators and assigns, that they, the said parties of the second part, their executors, administrators and assigns, keeping and performing the covenants herein contained on their part to be kept and performed, shall and may at all times, and from time to time, peaceably and quietly have, hold, use and enjoy the demised premises and part and parcel thereof, with the appurtenances, without any manner of let, suit, trouble, or hindrance from the party of the first part, its successors or assigns; and that the said party of the first part shall and will, at any time hereafter, execute and deliver such further assurances as may reasonably be required for fully effectuating the objects, intents, and purposes of this agreement, and for the more fully securing unto the parties hereto of the sec-
572 ond part, all the rights and privileges hereinbefore mentioned and granted, or intended so to be; and that the said party of

the first part shall and will, at any time during the said term, when requested by the said parties hereto of the second part, exercise every corporate power and do every corporate act which the said party of the first part may now or at any time hereafter lawfully exercise or do, to secure to the parties of the second part the full enjoyment of the premises hereby demised and every part thereof.

Twelfth.—That the said party of the first part doth hereby constitute and appoint the parties of the second part, and each of them, the true and lawful attorneys or attorney, of the party of the first part, in the name of the party of the first part, but for the use and benefit of the parties of the second part, to demand, collect, reduce to possession, sue for, recover and receive all and singular, the choses in action and other personal property assigned and transferred to the said party of the second part, under the second article of this agreement, and to make such compromises and agreements, and sign such receipt, acquit-ances and release in reference thereto as the parties of the second part may think fit.

573 Thirteenth.—It is finally agreed and understood that every promise, covenant or obligation hereby emposed on or assumed by either of the party hereto of the first part, or the parties hereto of the second part, is imposed on or assumed by the said party of the first part, its successors and assigns, or the parties of the second part, their executors, administrators or assigns, as the case may be.

In witness whereof, the said party of the first part hath hereto set its corporate seal, and caused these presents to be attested by its president thereto duly authorized, and the said parties of the second part have severally hereto set their hands and seals, and have also signed and sealed this indenture by their said firm name of the Southern Railroad Association, on the day and year first above written.

A. M. WEST, [SEAL.]
President Mississippi Central R. R. Company.
SAM. TATE. [SEAL.]
SOUTHERN R. R. ASSOCIATION, [SEAL.]
By H. S. McCOMB.
J. BARDWELL. [SEAL.]
EBEN D. JORDAN. [SEAL.]
H. W. GRAY. [SEAL.]
JOHN L. KING. [SEAL.]
CHAS. A. LAMBARD. [SEAL.]
C. H. McCORMICK. [SEAL.]
J. B. ALEXANDER. [SEAL.]
574 H. D. NEWCOMBE, [SEAL.]
By J. B. ALEXANDER, *Attorney-in-Fact.*
S. M. FELTON. [SEAL.]
HENRY LEWIS, [SEAL.]
By H. S. McCOMB, *Attorney-in-Fact.*

Consolidated and income and equipment mortgages of Mississippi Central Railroad Company.

Consolidated Mortgage of the Mississippi Central Railroad Company.

This indenture, made the first day of May, in the year of our Lord one thousand eight hundred and seventy-two, between the Mississippi Central Railroad Company, of the first part; the Southern Railroad Association, of the second part; and Edmund J. Forstall, John Newell, and Junius B. Alexander, of the third part. Witnesseth:

Whereas, the party of the first part has outstanding bonds and obligations incurred in the construction, equipment and operation of its railroad amounting to nearly five million dollars, and is desirous of extending its railroad from its present terminus
575 at Jackson, Tenn. northerly to the left bank of the Ohio river, opposite to the southern termination of the Illinois Central railroad, so as to make a continuous line of railroad from its southern terminus, at Canton, to the Ohio; and in order to retire and discharge such outstanding bonds, and to obtain means to extend its railroad to the Ohio, and to complete, equipp, and put the whole of the said line, from Canton to the Ohio, in order, as a first-class railroad, has resolved to issue eight thousand bonds, each for one thousand dollars, and the interest thereon, and to be numbered consecutively from No. 1, to No. 8000 inclusive, of the tenor and effect following, that is to say:

UNITED STATES OF AMERICA.

$1,000. *States of Mississippi, Tennessee and Kentucky.* No.—.

Consolidated Mortgage Bond, Payable in Gold Coin.

The Mississippi Central Railroad Company acknowledges itself indebted unto the bearer in the sum of one thousand dollars, and promises to pay the same in gold coin of the United States of America, at the office of the said company, in the city of New York, on the first day of May, anno Domini one thousand nine
576 hundred and twelve; and to pay the interest thereon at the rate of seven per cent. per annum, in like gold coin payable semi-annually, at the said office in the city of New York, on the first days of May and November, in each year, until the principal moneys shall be paid, upon presentation and surrender of the interest warrants, or coupons, hereto annexed, as they respectively become payable, free from United States tax.

This is one of eight thousand bonds, numbered consecutively from No. 1 to 8000 inclusive, each of like tenor, amount and date, issued by the said company described in a deed of trust in the nature of a mortgage to Edmond J. Forstall, John Newell and Junius B. Alexander and will upon the certificate hereon endorsed, become secured thereby.

In witness whereof, the said Mississippi Central Railroad Com-

pany has caused its common seal and the signatures of its president and treasurer to be hereto affixed the first day of May, 1872.

—— ——, *President.*

—— ——, *Treasurer.*

(Endorsed.)

577 The within is one of eight thousand bonds, for one thousand dollars each, secured by a deed in the nature of a mortgage, bearing even date therewith, made by the Mississippi Central Railroad Company, and the Southern Railroad Association to the subscribers, Edmond J. Forstall, John Newell and Junius B. Alexander, dated May 1, 1872, and duly recorded, covering the railroad franchises and property, real and personal, of the said Mississippi Central Railroad Company.

May 1, 1872.

Now, therefore to secure the said bonds, to be issued as aforesaid, in consideration of the premises, and of eight million dollars to be paid and satisfied to the parties of the first and second parts, upon the bonds so to be issued, and of one dollar to each of the parties of the first and second parts, paid by the parties of the third part, the receipt whereof is hereby acknowledged, the parties of the first and second parts have granted, bargained, sold, remised, released, aliened, enfeoffed and confirmed, and by this indenture do grant,

578 bargain, sell, remise, release, alien, enfeoff and confirm unto the parties of the third part, the survivors and survivor of them, and such persons as may be substituted as parties of the third part, in their or either of their places, as hereinafter provided, their heirs and assigns, and the heirs and assigns of the survivor forever as joint tenants, and not as tenants in common, the railroad of the party of the first part extending from Canton, Mississippi, to Jackson, Tennessee, and its proposed extension therefrom to the left bank of the Ohio, with all the franchises of the party of the first part, all lands, railroad tracks, sidings, rights and privileges, station houses and grounds, depots and depot grounds, machine shops, and machinery used in or in connection therewith, engines, cars, rolling stock and apparatus of every description used in connection with said railroad, and all that may hereafter be acquired in any manner, in continuance of the said road to the Ohio river, and its operation, whatsoever.

To have and to hold the same by a title and lien superior to any leasehold or other rights, title or estate of the party of the second part derived from the party of the first part, and held by or

579 in pursuance of any contract, lease, deed or other instrument whatsoever, from or with the party of the first part, and in such manner as to vest in the parties of the third part, all the franchises, rights, and real and personal estate, above described, in the same manner as if the party of the first part owned the same absolutely, and without any outstanding right, title, claim or demand thereon, to the parties of the third part, their survivors and survivor, and to such persons as may be substituted as parties of the third

part in their, or either of their places, as hereinafter provided; and the heirs and assigns of the survivor, upon the trust, confidence and conditions following, and the parties hereto do expressly covenant and agree as follows, that is to say:

First.—Whereas, the Mississippi Central Railroad Company has now outstanding bonds and obligations in the aggregate amounting to four millions and six hundred and twenty-nine thousand dollars, which constitute a lien upon the whole, or some portions of its railroad and property, described as follows:

One million three hundred and fifty thousand dollars upon bonds made by it, secured by a mortgage made by it to Charles
580 Butler, Azariah C. Flagg and Jacob Thompson, dated November 1, A. D. 1854.

One million two hundred and seventy-nine thousand dollars for bonds advanced to it by the State of Tennessee which the company is bound to pay and which are a lien upon its property, by virtue of an act of the legislature of Tennessee entitled "An act to establish a system of internal improvements in this State," passed the eleventh day of February, A. D. 1852.

Two million dollars upon its bonds or obligations secured by its mortgage to Jacob S. Rogers, Daniel Ravenel and William L. Sharkey.

It is therefore covenanted and agreed that three thousand of the said bonds, numbered consecutively from number five thousand and one to eight thousand, inclusive, or their proceeds, are, by the parties of the third part, to be delivered to the Mississippi Central Railroad Company to be used in the construction of the line of railroad from Jackson, Tennessee, to the Ohio river, opposite Cairo, from time to time, as fast as the parties of the third part, or their survivors or survivor, or their successors in the trust, as hereinafter provided, shall be satisfied that work has been done upon
581 said railroad, equivalent to the value of the bonds delivered, or the said Mississippi Central Railroad Company, with the approval of the parties of the third part, or their successors, make arrangements for the sale or conversion of a part or all of such three thousand bonds into money when the trustees shall deliver the bonds to be sold or converted to the purchasers on receiving their proceeds, and shall deposit the same in the United States Trust Company of the City of New York, or such bank in the city of New York, as shall at the time be agreed upon by the parties of the third part and their successors, with the said Mississippi Central Railroad Company; and the parties of the third part, and their successors, shall hold such proceeds upon the same trust and for the same purpose, to be used by the said last-named company in the completion of the said line, and of its equipment, until line of railroad from Jackson to Cairo is completed and equipped, when the parties of the third part will deliver the residue of said three thousand bonds to the Mississippi Central Railroad Company. The bonds numbered consecutively from number one to number four thousand six hundred and twenty-nine, inclusive, are to be held by the
582 parties of the third part on deposit in the United States Trust

Company, without their certificate, and only to be exchanged in payment, dollar for dollar, for any bonds or other debts secured by mortgage or lien of any sort upon any property and franchises of the said Mississippi Central Railroad Company and its branches, until such liens shall be discharged, and the bonds numbered from four thousand six hundred and thirty to five thousand, inclusive, are to be delivered by the parties of the third part to the party of the first part, to be used by it in its maintenance and operation of its road.

Second.—That the parties of the first and second parts, until default shall be made in the payment of any of the interest to accrue upon any of the bonds to be made pursuant to the terms thereof, or of the principal when the same shall become payable, shall remain in the possession and use of the said railroad, constructed and to be constructed, and all the franchises and property hereinbefore granted, bargained, sold, remised, released, aliened, enfeoffed, confirmed, conveyed and transferred, and that if the party of the first part shall and do well, truly and seasonably pay, according
583 to the terms, obligations and conditions thereof, each and all of the bonds which it may make in pursuance of the provisions of this indenture, together with all the interest thereon, free and discharged of United States taxes, which the party of the first part is to pay, then this indenture and the estate, right, title, claim and demand of the parties of the first and second parts herein and hereby created, passed and conveyed to the parties of the third part, their survivors and survivor, and such person or persons as may be substituted in their place as parties of the third part, and trustees herein, and the heirs and assigns of the survivor, shall become and be absolutely null and void.

And it is mutually agreed and understood, that this indenture and the terms, obligations and conditions herein contained are not intended to, and do not, affect any of the rights, duties and title of the parties of the first and second parts, in relation each to the other, but that all the rights, title, property, claim and demand of both the parties of the first part, and the parties of the second part are, as between them, passed hereby to the parties of the third part, without respect to any relative rights, title, property, claim or
584 demand in respect thereof, existing or to exist between the said parties of the first and second parts.

Third.—That the bonds to be made by the party of the first part shall, before being issued, be certified by the parties of the third part, or their substitutes for the time being, under their respective signatures, upon the back of such bonds, to have been issued in pursuance of this indenture, and in the manner as substantially set forth in the form of the bond hereinbefore contained, and that, until so certified, they shall not become secured hereby.

Fourth.—In case of the death, resignation or inability to act of either of the parties of the third part, the franchises, rights and property of every description herein conveyed to them, shall at once vest in the survivors or survivor; and the survivors or survivor may, with the assent of the party of the first part, designate a per-

son or persons to succeed such person or persons, dying, resigning or unable as one of the parties of the third part; and upon any person so designated, delivering to the survivors or survivor, and
585 to the party of the first part, at its office in New York, a written acceptance of the trust, he shall thereupon become a successor of the person in whose place he shall be designated, with all the rights and powers herein and hereby vested in the parties of the third part; and in case all the parties of the third part shall die, resign, or become unable, as aforesaid, so that there shall be no parties of the third part, persons to succeed them may be appointed by the supreme court of either Mississippi, Tennessee or Kentucky, on the application of any holders of at least one hundred of the bonds to be issued as aforesaid, on a notice of the application to be previously published, in at least three leading commercial daily newspapers in the city of New York for four successive weeks.

Fifth.—The parties of the third part, their heirs, executors and administrators, shall not, nor shall either of them be answerable for the acts, omissions, defaults of each other, in matters relating to this indenture, or of any of the provisions thereof, and no person, now or hereafter, being or becoming a party of the third part, shall be responsible except for his wilfull default or gross negligence
586 in the discharge of the duties or trusts herein provided for.

And the parties of the first and second parts do hereby covenant, promise and agree, to and with the parties of the third part, their survivors and survivor, and their successors as parties of the third part as hereinbefore provided, that the parties of the first and second parts, upon the reasonable request of the parties of the third part, or their successors, will make, execute and deliver to the parties of the third part, and their successors, all and every conveyance, assurance or transfer for the better and more effectually vesting and confirming in the parties of the third part, and their successors, the franchises and real and personal estate, granted or intended to be granted to them for the uses and trusts herein contained, as by the parties of the third part, or their successors, or their counsel learned in the law, shall be reasonably desired, advised or required.

And the parties of the first and second parts further covenant and agree with the parties of the third part, that, upon any default in the payment of the interest or principal of any of the bonds issued in pursuance hereof, or upon any default in the rea-
587 sonable performance of any covenant herein contained, on the part of the parties of the first and second parts, or on the part of either of them, if such default shall remain for six months then, at the request in writing of the holders of at least one hundred of the said bonds then outstanding, and proof by their affidavits of such default or defaults, the parties of the third part, and their survivors or survivor, or their successors designated as aforesaid, shall either in person or by their attorneys, agents and servants, enter into and take possession of all the mortgaged premises, and have, use and operate the said line of railroad, with all its franchises and property, real and personal, and collect and receive

all income and profits thereof, and from them pay and discharge all expenses they may incur in so doing, and any expenditures they may deem proper for the maintenance and protection of the premises, and the repairs, replacements and improvements, to keep up and render the said line of railroad from Canton to the Ohio river, with its branches, efficient and safe; and the parties of the third part, their survivors and survivor, and such successors may, in their discretion, sell the said mortgaged premises, including all the franchises and property, real and personal, and
588 rights of every sort appertaining thereto, at public auction to the highest bidder, in the city of New York, upon a notice of the time and place of sale, to be published at least three months prior thereto in three commercial newspapers of large circulation, published at the time in the city of New York, and to continue the publication once in each week, in such newspapers until the day of sale, and the parties of the third part may, in their discretion, adjourn the sale from time to time, but if such adjournments shall be for more than two days, notice of the adjournment shall be published in the said newspaper at least twice before the adjourned day of sale; upon making such sale the parties of the third part, or their survivors or survivor, and their successors in the trust for the time being, shall execute and deliver to the purchaser or purchasers, a deed of the premises which shall convey to them a full, valid and indefeasible title to the said railroad, franchises, rights and all the real and personal estate, of every description herein, in any manner described, which shall be a perpetual bar and estoppel to any claim or demand thereto, or to any part thereof, of the parties of
589 the first and second parts, and each of them; and the parties of the first and second parts, covenant and agree to and with the parties of the third part, their survivors and survivor, and their successors and successor, and the grantees under such deed, that neither the parties of the first nor the parties of the second part will ever claim any right, title, interest or equity in or to any portion of the mortgaged premises, in bar, opposition to, or impeachment of, the title passed thereby.

Or the parties of the third part, their survivors and survivor, and their successors or successor, may in their discretion, in case of any default in any of the covenants or conditions hereof, foreclose the equity of redemption of the parties of the first and second parts, and of all other persons having any legal or equitable rights or claims in or to the mortgaged premises, or in any part or parcel thereof, including the rights and franchises appurtenant, by any proceedings at law or in equity, provided for by the laws of the respective States in which the portions of the said line of railroad shall be, and either in the courts of such State, or in the circuit court of the United States.

590 And the parties hereto agree that, in case of the taking possession of the mortgaged premises by the parties of the third part, or their survivors or survivor, and successors or successor, and of the sale thereof as above provided, or upon a foreclosure as above provided, the net proceeds arising from the operation of the

said railroad, or from the sale thereof, after paying the expenses thereof, and the compensation and expenses of the parties of the third part, their survivors and survivor, and their successors in managing the trust, shall be applied by them to the payment of all the said bonds then outstanding and owing, and the interest warrants upon them payable before and up to the time of application, if such net proceeds shall be sufficient; but if they are insufficient, such net proceeds shall be applied by them to the payment of each of such bonds and the interest without preference, and so that each holder of a bond, or of any interest warrant, payable before or up to the time of the application, shall receive a payment thereon of the same proportion of such net proceeds which his debt bears to the whole amount owing and intended to be secured hereby.

591 And the party of the first part covenants, promises and agrees to and with the parties of the third part, their survivors and survivor, and their successors and successor, that it will seasonably pay and discharge all taxes and assessments upon the mortgaged premises, and upon every part and parcel thereof, and that it will seasonably pay and discharge the interest upon the said bonds, and every one of them, upon the presentation and surrender of their respective interest warrants as they mature, and in the manner provided in the said bonds; and that it will annually pay to each of the parties of the third part, their survivors and successors, for his ordinary services in the trusts herein contained the sum of —— dollars, and will also pay each of them any sums expended for any clerk hire they may deem it proper to incur, or the retainer or payment of fees of legal counsel whom they may consult upon any questions touching their powers and duties, and a just compensation for any extraordinary services which it may become necessary for them to bestow in and about the trusts herein contained.

592 And this indenture further witnesseth, that either of the parties of the third part may discharge himself from any further duties under this indenture by serving upon the party of the first part, and the other parties of the third part for the time being, a resignation, in writing, by him subscribed, addressed to them and the bondholders, and by publishing a copy thereof in three leading commercial newspapers in the city of New York for at least two successive weeks, and, after such service and publication of such notice, by executing under his seal and delivering the same to the remaining parties of the third part releasing to them all his rights, title and estate in or to the mortgaged premises for the purposes herein contained and expressed, he shall be deemed no longer a party hereto. And any person who may hereafter be appointed as a trustee to succeed any of the parties of the third part, may in like manner resign and be discharged from the trusts herein.

And this indenture further witnesseth, that upon the full payment and satisfaction of the said eight thousand bonds, and of all the interest thereon, and the complete performance of all the
593 covenants, agreements, conditions and provisions herein contained, all the franchises, estates, titles and interest of the par-

ties of the third part, their survivors and successor, herein and hereby conveyed shall cease, determine and become absolutely null and void; and that upon proper evidence thereof the parties of the third part, their survivors or survivor, and successors and successor, for the time being shall make and acknowledge proper satisfaction thereof.

In witness whereof, the parties of the first and second parts have respectively set hereto their common seals and the signatures of their respective presidents and secretaries, and the parties of the third part have hereto set their hands and seals the day and year first above written.

[SEAL.] A. M. WEST,
President Mississippi Central Railroad Company.

R. P. NEELY, *Secretary.*

THE SOUTHERN RAILROAD ASSOCIATION,

[SEAL.] By H. S. McCOMB, *President.*

Attest: S. H. EDGAR.

EDM. FORSALL. [SEAL.]
JOHN FEWELL. [SEAL.]
J. B. ALEXANDER. [SEAL.]

Sealed and delivered in the presence of—
DAVID W. PRICE,
As to the Southern Railroad Association, John Newell, and J. B. Alexander.

594 STATE OF MISSISSIPPI, }
Marshall County. }

Before me, H. A. Cooper, mayor and *ex officio* justice of the peace in Marshall county and State aforesaid, this day personally appeared the above-named Absalom M. West, president of the Mississippi Central Railroad Company, who acknowledged that as such president he signed, sealed, affixed the corporate seal of said company to and delivered the foregoing deed on the day and year therein mentioned as his official act and deed and as the act and deed of said company.

Given under my hand and seal this twenty-sixth day of April, A. D. 1872.

H. A. COOPER,
[SEAL.] *Mayor and ex Officio Justice of the Peace.*

STATE OF TENNESSEE, }
Hardeman County. }

Personally appeared before me, W. C. Dorion, clerk of the county court of said county, Absalom M. West, president of the
595 Mississippi Central Railroad Company, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that as *cuh* president he executed the within instrument and affixed the corporate seal of said company thereto on

behalf of said company on the day of its date for the purpose therein contained.

Given under my hand and seal of office, at Bolivar, on this 27th day of April, 1872.

W. C. DORION, *Clerk.*

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 23d day of May, 1872, before me, the subscriber, David W. Price, a notary public duly appointed, commissioned, and sworn for the said city, personally appeared Henry S. McComb, to me personally known to *me* the president of the Southern Railroad Association and the person who signed the foregoing deed as such president, and he acknowledged before me that, as president of the said Southern Railroad Association, he signed, sealed, and delivered the foregoing deed on the day therein mentioned as the voluntary act and deed of the said Southern Railroad Association on its behalf; and, the said Henry S. McComb being by me duly sworn, he made oath that he is the president of the said Southern Railroad Association, and that he affixed its common seal to the said instrument by authority thereof, and that Samuel H. Edgar is the secretary of the Southern Railroad Association, and that at the same time the said Samuel H. Edgar set his signature to the said instrument in pursuance of the authority of the said association.

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Given under my hand and official seal this 23d day of May, A. D. 1872.

DAVID W. PRICE,
Notary Public.

[SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 23d day of May, 1872, before the subscriber, David W. Price, a notary public in the said city and State, duly commissioned and sworn, personally appeared Henry S. McComb and Samuel H. Edgar, to me personally known to be the president and secretary of the Southern Railroad Association and to be the persons whose names are subscribed to the foregoing deed as such president and secretary respectively, and they severally acknowledged before me that as such president and secretary they signed, sealed, and delivered the foregoing deed on the day therein mentioned as the voluntary act and deed of the said Southern Railroad Association.

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And the said Henry S. McComb and Samuel H. Edgar, being by me duly sworn, made oath that the said Henry S. McComb is the president and the said Samuel H. Edgar is the secretary of the said Southern Railroad Association, and that the seal affixed to the said deed is the common seal of the said Southern Railroad Association and they were authorized by it to execute the foregoing deed on its behalf and affix thereto the said common seal.

In witness whereof I have hereunto set my hand and official seal the day herein first above written.

[SEAL.] DAVID W. PRICE.

598 *Consolidated Mortgage of the New Orleans, Jackson and Great Northern Railroad Company.*

STATE OF LOUISIANA, }
City of New Orleans. }

Be it known that this day, before me, P. Charles Cuvellier, a notary public in and for the city of New Orleans, parish of Orleans, State of Louisiana aforesaid, duly commissioned, qualified, and sworn, personally came and appeared Henry S. McComb, president of the New Orleans, Jackson and Great Northern Railroad Company, a duly incorporated institution of this State, and herein acting in his said capacity by virtue of and in pursuance of a preamble and resolutions of the board of directors of the said company passed on the twenty-seventh day of April, 1872, which preamble and resolutions (a duly certified copy whereof is hereunto in the margin annexed for reference) are in the words and figures following, to wit:

"Whereas the New Orleans, Jackson and Great Northern Railroad Company, for the purpose of securing the payment of
599 its corporate bonds to the amount of three million dollars, heretofore and on the twelfth day of June, one thousand eight hundred and fifty-six, mortgaged to James D. Denegre its road, made and to be made, from the city of New Orleans, in the State of Louisiana, to Canton, in the State of Mississippi, together with the depot grounds, buildings, cars, machinery, and other property in such mortgage particularly described;

"And whereas bonds have been issued under said mortgage to the full amount thereof, which are now outstanding and unpaid;

"And whereas subsequently to the making and execution of said mortgage, to wit, on the first day of October, A. D. one thousand eight hundred and sixty, the said company, for the purpose of securing the payment of an additional like amount of corporate bonds, did also mortgage to James D. Denegre its line of road, made and to be made, from the city of New Orleans aforesaid to Aberdeen, in the State of Mississippi, together with the depot grounds, buildings, cars, machinery, and other property in said mortgage particularly described; which said mortgage is a first and prior lien on the line of road between Canton and Aberdeen aforesaid
600 and a second lien on the line of road between New Orleans and Canton;

"And whereas bonds have been issued under said mortgage to the amount of only one million five hundred thousand dollars, the remainder of said issue of bonds having been cancelled by said company;

"And whereas said company has also cancelled bonds heretofore authorized to be issued to the amount of one million dollars, known

as 'city extension bonds,' and also bonds authorized to be issued to the extent of two million dollars, known as 'income bonds,' which said 'city extension' and 'income bonds' have not, however, been negotiated;

"And whereas the hereinbefore mentioned negotiated and outstanding mortgage bonds, amounting in the aggregate to four million five hundred thousand dollars, constitute all the liens and encumbrances upon the line of railroad and property of said company at the present time;

"And whereas the said company is now desirous of consolidating the two mortgages hereinbefore described into one mortgage, and to retire the bonds already issued and outstanding under said
601 mortgage, and is also desirous of providing additional means to improve and put in order a first-class railroad, its railroad now constructed, and equip the same; and to construct, complete, and equip its line of road to Aberdeen, in the State of Mississippi, and to provide equipment and property for its lines of road, and to pay off its floating debt:

"Therefore be it resolved, That the president be authorized to make eight thousand bonds of this company, to be numbered consecutively from number one to number eight thousand, inclusive, each to be for one thousand dollars, payable on the first day of January, one thousand nine hundred and twelve, bearing interest at the rate of seven per cent. per annum, payable semi-annually at the office of the company, in the city of New York, and the interest and principal payable in gold coin of the United States of America, of the tenor and to the effect following:

602 "UNITED STATES OF AMERICA.

"No. —. *States of Louisiana and Mississippi.* $1,000.

"*Consolidated Seven Per Cent. Gold Loan*, $8,000,000.

"Payable in gold coin of the United States of America.

"The New Orleans, Jackson and Great Northern Railroad Company acknowledges itself indebted to the bearer in the sum of one thousand dollars, which it promises to pay, in gold coin of the United States of America, on the first day of January, in the year one thousand nine hundred and twelve, at its office in the city of New York, and to pay interest thereon at the rate of seven per cent. per annum, payable semi-annually at its office in the city of New York, in like gold coin, upon presentation and surrender of the interest warrants or coupons hereto annexed, on the first days of January and July in each year, as they respectively become payable, so long as the principal remains unpaid, without deduction for any United States tax, the company agreeing to assume and pay the same.

"This is one of eight thousand bonds of similar amounts,
603 tenor, and date, referred to in a mortgage made by the said New Orleans, Jackson and Great Northern railroad to Ed-

mond J. Forstall, John Newell and Junius B. Alexander, dated the first day of May, 1872, to secure the payment of such bonds, and when the certificate hereon endorsed, is subscribed by them, it will be secured thereby.

"In witness whereof, the said company has caused its common seal and the signatures of its president and secretary to be hereto affixed, the first day of May, 1872.

—— ——, *President.*
—— ——, *Secretary.*

(Endorsement.)

"The within is one of eight thousand bonds for one thousand dollars each, secured by a mortgage made by the New Orleans, Jackson and Great Northern Railroad Company to Edmond J. Forstall, John Newell, and Junius B. Alexander, called its 'consolidated mortgage,' and duly registered and recorded, according to the laws of the States of Louisiana and Mississippi.

"Dated May 1st, 1872.

"Resolved, That the president be further authorized and instructed to secure payment of said bonds and of the interest
604 thereon by a mortgage and deed of trust of the railroad and franchises of this company, including all of its real and personal estate and all its property, immovable and movable, and rights; its levee front in the city of New Orleans, and all rights appurtenant thereto, and all real and personal estate, immovable and movable property hereafter to be owned by it in the States of Louisiana and Mississippi, to Edmond J. Forstall, John Newell, and Junius B. Alexander.

"Resolved, That not less than four million five hundred thousand dollars of said bonds, being the same which are numbered from number one to number four thousand five hundred, inclusive, shall be reserved and shall be deposited with the United States Trust Company of the City of New York, and the same shall not be used except for the purpose of being exchanged at par for the outstanding mortgage bonds of the company hereinbefore mentioned, and said four million five hundred thousand dollars of bonds shall be used and employed for no other purpose whatever until the maturity of any of the outstanding bonds, which may not be so exchanged, whereupon the United States Trust Company shall sell the
605 same under the direction of the New Orleans, Jackson and Great Northern Railroad Company and apply the proceeds to the payment of such outstanding bonds then unpaid, and if there shall then remain none unpaid, and whenever all of them shall be paid, any unsold bonds or their proceeds shall be paid or delivered to the said company. The bonds to be issued from number four thousand five hundred and one to five thousand, inclusive, are to be certified by the said Edmond J. Forstall, John Newell, and Junius B. Alexander, as proposed in the form of such bonds, and then delivered to the said company to be used by it in the construction and operation of its railroad and extension. The residue of the eight

thousand bonds, being those numbered from five thousand and one to eight thousand, inclusive, shall be placed in the hands of Edmond J. Forstall, John Newell, and Junius B. Alexander, to be used only as follows:

"The company has, since the month of June, 1870, incurred debts and liabilities for putting in order and improving its line of railroad from New Orleans to Canton, Mississippi, and equipping the same, and proposes to make large expenditures of money in improving and putting the same in order as a first-class railroad
606 and furnishing it a proper equipment therefor. Upon evidence satisfactory being furnished to the said Edmond J. Forstall, John Newell, and Junius B. Alexander of the amount necessary to discharge the debts and liabilities incurred in so putting in order and improving its line of railroad since June, 1870, they are to deliver to the company the proceeds of so many of said bonds numbered from five thousand and one to eight thousand as they shall deem and equivalent therefor, and thereafter as often as they shall be satisfied that the company has made further expenditures for improving, completing, and putting the same in order as a first-class railroad, and in procuring an additional equipment therefor they shall deliver to it as many of the said bonds or their proceeds as they shall deem an equivalent to the amount of such expenditures, and so, from time to time, until they shall be satisfied that the said line from New Orleans to Canton is completed and equipped as a first-class railroad or until the whole number of the said three thousand bonds or the proceeds thereof shall have been delivered to the company, or the company can make arrangements for the sale or conversion of a part or all of such three thousand bonds
607 into money, and in such case they shall receive the proceeds and deposit them with the United States Trust Company in the city of New York, or with such bank in said city as may be agreed upon by them and such company, and hold such proceeds upon the same trust and to be used in the same manner as the said bonds, and when they shall be satisfied that the said line of railroad from New Orleans to Canton is in good order and well equipped as a first-class railroad they are to deliver to the company all remaining bonds or their proceeds.

"Resolved, That no more bonds or evidences of debt shall at any time be issued under or be secured by either of the already executed mortgages hereinbefore mentioned, and that whenever the bonds already issued under said mortgages shall have been exchanged as aforesaid then said mortgages shall be satisfied to the extent of exchanges made each year, and upon final exchange or payment shall be discharged and cancelled of record.

"Resolved, That the company will, at all times, until the existing mortgages hereinbefore mentioned shall have been extinguished by the substitution of the bonds now authorized to be issued for
608 the bonds issued under said prior mortgages, keep paid off and discharge any and all interest which shall become due and payable upon the bonds secured by said prior mortgages.

"Resolved, That the company will pay to the holders of the bonds

now authorized to be issued the semi-annual interest thereon and the principal of the same without deduction from either said principal or interest of any tax or taxes which the said company may by any present or future laws of the United States be required to retain therefrom, the said company hereby assuming and agreeing to pay the same.

"Resolved, That the president be also authorized and instructed to secure the payment of the said bonds, and of the interest thereon, by a mortgage of the railroad and franchises of this company, including all of its real and personal estate and all its property immovable and movable of every description owned by it in the States of Louisiana and Mississippi, and which mortgage shall contain the following provisions and conditions—that is to say:

"1. It shall provide that until there shall be a default in
609 the payment of any of the interest warrants on any of the said bonds as they respectively become payable or of the principal when the same becomes payable or of any of the covenants or conditions therein this company shall retain the possession and use of the mortgaged premises.

"2. That this company shall and will at all times seasonably pay and discharge all the taxes and assessments which may be taxed or imposed upon the mortgaged premises or any part or parcel thereof.

"3. That in case of any default in the said payments, covenants, or conditions the same may be foreclosed by Edmond J. Forstall, John Newell, and Junius B. Alexander or any of the parties interested therein for the common benefit of the holders of the outstanding bonds or the mortgaged premises may be taken possession of by the said Forstall, Newell, and Alexander to operate and use for such holders of the outstanding bonds in any manner authorized by the laws of Louisiana or Mississippi within their respective States.

"Resolved, That if the company shall at any time here-
610 after, after demand made, make default or refuse, neglect, or omit for any period exceeding three months to pay the semi-annual interest on the bonds now authorized to be issued which shall have been negotiated or exchanged as hereinbefore provided or any of them, upon demand of the holders of one-tenth of the outstanding bonds the whole principal sum of each and all of the said bonds then outstanding shall forthwith become due and payable, anything in said bonds contained to the contrary thereof notwithstanding.

"Resolved, That all the bonds now authorized to be issued and which may be sold or negotiated shall be upon an equality as far as regards the security for the payment thereof, notwithstanding the same may be negotiated and disposed of at different times, and none of the said bonds shall be entitled to priority.

"Resolved, That all the said bonds, after the reservation of those hereinbefore specified, and the proceeds thereof shall be faithfully used and applied to the construction, completion, and equipment of the railroad of said company and of the property, structures, build-

ings, and improvements appertaining to the same so as to make the same a first-class railroad and to the payment of the floating
611 debt of the company.

"Resolved, That whenever and as often as the company shall acquire any lands or equipments or any other property or interest, of whatever name or nature, for use in connection with its line of railroad or shall acquire any additional lands said company shall acquire, possess, and hold the same and every part and parcel thereof upon and subject to the mortgage made to secure the said bonds.

"Resolved, That the company will from time to time and at all times hereafter and as often as thereunto requested by the trustees in said mortgage so to be made and executed, as hereinbefore provided, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the said trustees the railroad, equipment, appurtenances, and all other property of every nature hereinbefore mentioned or intended so to be or which may be hereafter acquired and all franchises now held or hereafter to be acquired, including the franchise to be a corporation, and that in case the said company shall hereafter receive or acquire lands or other property and the said trustees in
612 behalf of the holders of said bonds shall deem it for their interest and shall request the same then and in that case said company shall and will from time to time and at all times hereafter execute all and every such other mortgage or mortgages or deeds of trust and deeds of further assurance conveying the lands or property so received or acquired and in such manner as shall hold and bind the same as security for the payment of the principal and interest of the bonds aforesaid.

"Resolved, That the said Edmond J. Forstall, or his successor in New Orleans, be empowered to release from the lien and operation of said act of mortgage or deed of trust in such manner as he may be advised any lands or property which shall not be necessary for use in connection with the line of railway of the company, it being an express condition, however, of such release that the net proceeds of all property so conveyed or released shall be used only in the purchase of other property or equipment for the road."

Which said appearer declared that, in pursuance of the
613 above-recited preamble and resolutions, and also by virtue of the authority conferred upon the said company by an act of the legislature of this State, duly approved on the 20th of March, 1856, and entitled "An act to extend the power of railroad companies" (No. 194), said company will hereafter, as its convenience may require, from time to time, issue eight thousand bonds of the said New Orleans, Jackson and Great Northern Railroad Company, redeemable in forty years from the first day of January, 1872, for the sum of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annual-y in coupons of thirty-five dollars each, the principal and interest of said bonds being made payable in gold coin in the city of New York:

Now, therefore, in consideration of the premises, and in order to

secure the full, faithful, and punctual payment and redemption of each and all of the said bonds to be issued as aforesaid to any and all future holder or holders thereof and to each and every one of them when the same shall become due and payable, together with
the interest accruing on, in the manner and at the periods
614 of time hereinbefore stipulated and as evidenced by the coupons attached to the said bonds respectively, the said New Orleans, Jackson and Great Northern Railroad Company does by these presents, by its president, the said Henry C. McComb, grant in favor of Edmond J. Forstall, John Newell, and Junius B. Alexander, as well as in favor of all and every other person or persons whomsoever who may become the holders of the said bonds or coupons or any of them, a mortgage lien and privilege of its right of way, land, property, franchises, rights, and appurtenances, and also all the buildings, structures, and improvements erected thereon, and all and singular the cars, locomotive-, engines, warehouses, depots, machine shops and machinery, fixtures, untensils, and effects generally of every kind, nature, and description whatsoever in use upon the said railroad or anywise attached or appertaining to the same, without any exception or reservation, as well as all such as shall or may hereafter at any time be placed upon or attached to the said railroad, whether for the purpose of replacing others removed therefrom or from any other cause whatsoever, the said company promising, by its said president, not to alienate nor in any manner whatsoever
incumber or affect the same or any part or portion thereof
615 to the prejudice of these presents, the property hereby mortgaged being in part subject to two mortgages mentioned in the hereinbefore-recited resolutions.

It is distinctly understood that all the said bonds, when executed, are, before the issue thereof, to be severally marked "*ne va-ietur*" and countersigned by me, the said notary, for the purpose of more effectually indentifying the same herewith.

By reference to the annexed certificate of the record of mortgages in and for the parish of Orleans it will appear that there exists no mortgage nor incumbrance whatsoever inscribed upon the railroad, franchises, and appurtenances, nor upon any of the lands or property connected therewith, owned by the said corporation, other than the two mortgages mentioned and referred to in the resolutions hereinbefore recited.

And now personally came and appeared the said Edmond J. Forstall, who, after having read the foregoing act of mortgage, declared that he does by these presents accept the same as well for himself
as for all and every other person or persons who may here-
616 after become the purchaser or purchasers, assignee or assignees, holder or holders of the said bonds or coupons or any number thereof or any of them, tog-ther with the rights, privileges, and benefits thereunto belonging or in anywise appertaining.

And in further pursuance and execution of the resolutions of the board of directors of the said New Orleans, Jackson and Great Northern Railroad Company referred to and recited in the foregoing act of mortgage:

This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and seventy-two, between the said New Orleans, Jackson and Great Northern Railroad Company, of the first part, and the said Edmond J. Forstall, John Newell and Junius B. Alexander, of the second part, witnesseth:

Whereas, the said company, in pursuance of the above-recited resolutions, will, hereafter, as its convenience may require, issue eight thousand bonds, to be numbered consecutively from number one to eight thousand, inclusive, for the sum of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, as stated and particularly set forth in said foregoing act of mort-
617 gage, and as will appear by the form of said bond set forth in said resolutions, and will consequently be bound and holden unto the said bearers thereof as therein stipulated.

Now, therefore, the said New Orleans, Jackson and Great Northern Railroad Company, as well in consideration of the premises, and for the better securing the payment of the said bonds, so to be made and executed, and the interest, and taxes upon the principal and interest of the said bonds, agreed to be paid by the said company, as of the sum of one dollar, lawful money of the United States unto it well and truly paid by said Edmond J. Forstall, John Newell and Junius B. Alexander, at the time of the execution hereof, the receipt whereof is hereby acknowledged, and also in consideration of the moneys, and value to be received in the negotiation of the said bonds, has granted, bargained, sold, aliened, enfeoffed, released and confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, enfeoff, release and confirm, assign, transfer and set over unto the said parties hereto of the second part, as joint tenants, and not as tenants in common, and their
618 survivor or survivors, and to their successor or successors, whose appointment is hereinafter provided for, all its right of way lands, property, franchises, rights and appurtenances, and also all the buildings, structures and improvements, thereon and all and singular the cars, locomotives, engines, warehouses, depots, machine shops and machinery, fixtures, utensils and effects generally, of every kind, nature and description whatsoever, in use upon the said railway, or in anywise attached or appertaining to the same, intending hereby to include all its present real and personal estate and franchises now owned or hereafter to be acquired, without any exception or reservation, as well as all such as shall or may hereafter, at any time, be placed upon or attached to the said railroad, whether for the purpose of replacing others, removed therefrom, or from any other cause whatsoever.

To have and to hold the same, with the appurtenances unto the parties hereto of the second part, and their successor or successors, in the trusts hereby created, for their only use and behoof.

In trust, nevertheless, for the use, benefit and security of
619 the several persons, bodies, politic or corporate, their respective successors, executors, administrators and assigns, who shall be or become the holders of the said bonds intended to be

hereby secured, or any of them, upon the conditions and subject to the provisions hereinafter set forth, to wit:

And the parties hereto do hereby expressly covenant and agree as follows, that is to say:

First.—That the said bonds to be issued under this mortgage, numbered from number one to number four thousand five hundred, inclusive, shall be reserved and deposited with the United States Trust Company of the City of New York, and shall not be used except for the purpose of being exchanged at par for the outstanding mortgage bonds of the party of the first part, hereinbefore mentioned and said four thousand five hundred bonds shall be used and employed for no other purpose whatsoever, until the maturity of any of the outstanding bonds which may not be so exchanged, whereupon the United States Trust Company shall sell the same under the direction of the party of the first part, and apply the proceeds to the payment of such outstanding bonds then
620 unpaid; and if there shall then remain none unpaid, and when all of them shall be paid, any unsold bonds then remaining shall be delivered to the said company.

The bonds to be issued from number four thousand five hundred and one to five thousand, inclusive, are at once to be certified by the parties of the second part as proposed in the form of such bonds, and then delivered to the party of the first part, to be used by it in the construction and operation of its railroad and its connections.

The residue of the eight thousand bonds, being those numbered from five thousand and one to eight thousand, inclusive, shall be placed in the hands of the party of the third part, to be used as follows:

The party of the first part has, since the month of June, 1870, incurred debts and liabilities for putting in order and improving its line of railroad from New Orleans to Canton, Mississippi, and equipping the same, and expects to make large expenditures of money in improving and putting the same in order as a first-class railroad, and furnishing it a proper equipment therefor; upon evidence satisfactory to the parties of the second part, of the amount
621 necessary to discharge the debts, and liabilities, incurred in so putting in order and improving its line of railroad since June, 1870, they are to deliver to the party of the first part so many of such bonds, numbered from five thousand and one to eight thousand, or their proceeds, as they shall deem an equivalent therefor, and thereafter, as often as they shall be satisfied that the party of the first part has made further expenditures for improving, completing and putting the same in order as a first-class railroad, and in procuring additional equipment therefor, they shall deliver to it as many of the said bonds or their proceeds, as they shall deem an equivalent to the amount of such expenditures, and so from time to time, until they shall be satisfied that the said line from New Orleans to Canton is completed and equipped as a first-class railroad, or until the whole number of the said three thousand bonds, or their proceeds, shall have been delivered to the party of the first part; or the party of the first part may make arrangements for the

sale or conversion of a part or all of such three thousand bonds into money and in such case, the parties of the second part shall
622 receive the proceeds and deposit them with the United States Trust Company in the city of New York, or with such bank in said city as may be agreed upon between the parties of the second part and party of the first part, and the parties of the second part shall then hold the said proceeds upon the same trusts, and to be used in the same manner as the said bonds; and when the parties of the second part shall be satisfied that the line of railroad from New Orleans to Canton is in good order and well equipped as a first-class railroad, they are to deliver to the party of the first part all remaining bonds or their proceeds.

Second.—That the said New Orleans, Jackson and Great Northern Railroad Company will, at all times, until the existing mortgages hereinbefore mentioned shall have been extinguished by the substitution of the bonds hereby secured for the bonds issued under said prior mortgages, keep payed off and discharged any and all interest which shall become due and payable upon the bonds secured by said prior mortgages.

Third.—That the said New Orleans, Jackson and Great Northern Railroad Company, will pay to the holders of the bonds in-
623 tended to be hereby secured the interest thereon, and also the principal sums of the said bonds according to the provisions thereof, without deduction from either said principal or interest from any tax or taxes which said company may, by any present or future laws of the United States, be required to retain therefrom, the said company hereby agreeing to pay the same.

Fourth.—That if the said New Orleans, Jackson and Great Northern Railroad Company, its successors or assigns, shall at any time hereafter, after demand made, make default or neglect, or refuse, or omit for any period exceeding six months to pay the semi-annual interest on the bonds intended to be hereby secured, or any of them, then, upon demand of the holders of one-tenth of all bonds outstanding, the whole principal sum of each and all the said bonds then outstanding, and intended to be hereby secured, shall forthwith become payable, anything in said bonds or herein to the contrary notwithstanding.

Fifth.—That all the bonds so issued as aforesaid, and which may be sold or negotiated or exchanged, shall be upon an equality, as far as regards security for the payment thereof by these presents, notwithstanding the same be negotiated and disposed of at
624 different times, and none of said bonds shall be entitled to priority.

Sixth.—That whenever and as often as the said New Orleans, Jackson and Great Northern Railroad Company, or its successors shall require any franchises, lands or equipments, or other property or interest of whatever name or nature, for use in connection with its railroad, or for any purpose whatsoever, the said company, its successors or assigns, shall and will acquire, possess and hold the same, and every part and parcel thereof, upon and subject to the lien and trust of this indenture.

Seventh.—That the said New Orleans, Jackson and Great Northern Railroad Company will, from time to time, and at all times hereafter, and as often as thereunto requested by the parties of the second part, their successor or successors execute, deliver and acknowledge all such further deeds, conveyances and assurances in the law, for the better assuring unto the said parties of the second part, their successor or successors, upon the trust herein mentioned, of their railroad, its equipment, appurtenances, and all other property of every nature hereinbefore mentioned or intended so to be, or which may hereafter be acquired, including the franchise to
625 be a corporation; and that in case the said company, its successors or assigns, shall hereafter receive or acquire lands, or other property, and the said parties of the second part, their successor or successors, in behalf of the holders of said bonds shall deem it for the interest of their trust, and shall request the same, then, and in that case, the said company, its successors or assigns, shall and will, from time to time, and at all times thereafter, execute, acknowledge and deliver all and every such other mortgage or mortgages, or deeds of trust, and deeds of further assurance, covering the lands or property so received or acquired, and in such manner as shall hold and bind the same as security for the payment of the principal and interest of the bonds aforesaid, and the performance of the covenants, conditions and stipulations of this indenture.

Eighth.—The said parties of the second part shall, in their discretion, have full power upon the written request of the said company, to convey, by way of release or otherwise, to the persons designated by the said company or its successors, and to release from the lien and operation of these presents, in such manner as the said parties of the second part may be advised, any lands or
626 property which shall not be necessary for use in connection with the line of railway of the company; provided, however, that the net proceeds of all such property so conveyed or released shall be used only for the purchase of other property, or equipment for the road.

Ninth.—And it is further covenanted and agreed by the parties hereto, that in case of the death, resignation or inability of either of the said Edmond J. Forstall, John Newell and Junius B. Alexander, the franchises, rights and property of every description herein conveyed to them shall at once vest in the survivors or survivor; and that the survivor may, with the assent of the party of the first part, designate a person or persons to succeed such person or persons dying, or resigning, or unable as one of the parties of the second part, and upon the person or persons so designated delivering to the survivor and the said New Orleans, Jackson and Great Northern Railroad Company, at its office in New York, a written acceptance of the trust, he or they, as the case may be, shall thereupon become successor or successors of the person or persons dying, resigning, or unable, with all the rights and powers herein and hereby
627 vested in the parties of the second part; and in case all of the parties of the second part shall die, resign or become

unable as aforesaid, so that there shall be no parties of the second part, persons to succeed them may be appointed by the supreme court of either Louisiana or Mississippi, on the application of any holder of at least one hundred of the bonds to be issued as aforesaid, on a notice of the application to be previously published in at least three leading commercial newspapers in the city of New York, for four successive weeks, and the party of the first part will pay each party of the second — annually for his ordinary services, —— dollars; and to the parties of the second part necessary expenses for clerk hire and legal advice and a just compensation for any necessary extraordinary services.

Tenth.—And the New Orleans, Jackson and Great Northern Railroad Company further covenants and agrees to and with the said Edmond J Forstall, John Newell and Junius B. Alexander, that upon any default in the payment of the interest or principal of any of the bonds to be issued as aforesaid and to be
628 secured hereby, or upon default in the seasonable performance of any covenant herein contained on the part of the said New Orleans, Jackson and Great Northern Railroad Company, if such default shall remain for six months, then, at the request, in writing, of the holders of at least one hundred of the said bonds then outstanding, and proof by their affidavit of such default or defaults the said Edmond J. Forstall, John Newell and Junius B. Alexander, their survivors or survivor or their successors designated as aforesaid, shall, either in person or by their attorneys, agents and servants, enter into and take possession of all the mortgaged premises, and have, use and operate the said line of railroad, with all its franchises and property, real and personal, immovable and movable and collect and receive all income, and profits thereof, and from the same to pay and discharge all expenses they may incur in so doing, and any expenditures that they may deem proper for the maintenance and protection of the premises, and the repairs and replacements and improvements, to keep up and render the said line of railroad from New Orleans to Canton, with its branches, effi-
629 cient and safe; and the said Edmond J. Forstall, John Newell and Junius B. Alexander, their survivors or survivor, and successors or successor, may, in their discretion, sell the said mortgaged premises, including all the franchises and property, real and personal, and rights of every sort appertaining thereto, at public auction, in the city of New York, to the highest bidder, upon a notice of the time and place of sale, to be published at least three months prior thereto, in three commercial newspapers, of large circulation, published at the time in the city of New York, the publication to be continued once in each week in such newspapers until the day of sale; and the said Edmond J. Forstall, John Newell and Junius B. Alexander, or their survivors or survivor, or successors or successor may, in their discretion, adjourn the sale from time to time; but, if such adjournment shall be for more than two days, notice of the adjournment shall be published in the said newspapers at least twice before the adjourned day of sale. Upon making such sale the said Edmond J. Forstall, John Newell and Junius B. Alex-

ander their survivors or survivor and successors or successor in the trust for the time being, shall convey, execute and deliver to
630 the purchaser or purchasers, a deed of the premises, which shall convey to them a full, valid and indefeasible title to said railroad, franchises and rights, and all the estate, real and personal, and property, immovable and movable, herein and in any manner described, which shall be a perpetual bar and estoppel to any claim or demand thereto, or to any part thereof; and the said New Orleans, Jackson and Great Northern Railroad Company covenants and agrees to and with the said Edmond J. Forstall, John Newell and Junius B. Alexander, their survivors and survivor, successors and successor, and their grantees, under any such conveyance, jointly and severally, that it will never claim any right, title, interest or equity, in or to any portion of the mortgaged premises, in bar, opposition to, or impeachment of the title passed thereby.

Or the said Edmond J. Forstall, John Newell and Junius B. Alexander, their survivors or survivor, and successors or successor, may, in their discretion, in case of any default in any of the covenants or conditions hereof, foreclose the equity of redemption of the said New Orleans, Jackson and Great Northern Railroad Company, and of all other persons having any legal or equitable rights or claims in or to the mortgaged premises, or in or to any
631 part or parcel thereof, including the rights and franchises appurtenant, by any proceedings at law or in equity provided for by the respective States in which portions of the said railroad shall be, and either in the courts of such States, or in the circuit court of the United States.

And it is hereby covenanted and agreed, that in case of the taking possession of the mortgaged premises, and sale thereof, as aforesaid, or in case of the foreclosure of the equity of redemption as above provided, the net proceeds arising from the operation of the said railroad, or from the sale thereof, after reserving the compensation and expenses of the said Edmond J. Forstall, John Newell and Junius B. Alexander, their survivors and survivor, and successors and successor, in managing the trust, shall be applied by them to the payment of all the bonds secured hereby, then outstanding and owing, and the interest warrants upon them payable before and up to the time of application, if such net proceeds shall be sufficient; but, if they are insufficient, such net proceeds shall be applied by them to payment of such bonds, and the interest warrants without preference, and so that each holder of a bond or of an inter-
632 est warrant, payable before or up to the time of the application, shall receive a payment thereon of the same proportion of such net proceeds which his debt bears to the whole amount owing and intended to be secured hereby.

Eleventh.—If the said New Orleans, Jackson and Great Northern Railroad Company shall well and truly pay, or cause to be paid all the interest, without deduction of any income or other government taxes, as the same shall from time to time become due and payable upon the said bonds, as hereinbefore stipulated, and shall pay the principal of said bonds at maturity, according to the tenor and

true intent and meaning of said bonds, and shall keep and perform all the covenants and agreements herein contained, on the part of the said company, then, and in that case, this indenture shall be and become null and void; otherwise it shall be and remain in full force and effect.

And this indenture further witnesseth, that either the said Edmond J. Forstall, John Newell, or the said Junius B. Alexander, or their successors, may discharge himself from any further duties under this indenture by serving upon the New Orleans, Jackson and Great Northern Railroad Company, and the other parties of the
633 second part, for the time being, a resignation in writing, by him subscribed, addressed to them and the bondholders, and by publishing a copy thereof in three leading commercial newspapers of the city of New York, for at least two successive weeks, and after such service and the publication of such notice, by executing, under his seal, and delivering to the remaining parties of the second part, a deed releasing to them all his rights, title and estate in or to the mortgaged premises, for the purposes herein contained and expressed, he shall be deemed no longer a party hereto. And any person who may hereafter be appointed to succeed any of the parties of the second part may, in like manner, resign and be discharged from the trusts herein.

In witness whereof, the said New Orleans, Jackson and Great Northern Railroad Company hath hereto caused its common seal, and the signatures of its president and secretary to be affixed the first day of May, in the year of our Lord one thousand eight hundred and seventy-two, and the said Edmond J. Forstall, John Newell and Junius B. Alexander, have hereto set their hands and
634 seals upon the same day,

HENRY S. McCOMB,
President New Orleans, Jackson and Great Northern Railroad Company.

[SEAL.] R'D S. CHARLES, *Secretary.*
EDMOND J. FORSTALL. [SEAL.]
JOHN NEWELL. [SEAL.]
JUNIUS B. ALEXANDER. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans, } *ss:*

On this first day of May, in the year one thousand eight hundred and seventy-two, before me, Pierre Charles Cuvellier, a notary public in and for the parish of Orleans and city of New Orleans, State of Louisiana, and also a commissioner of deeds of the State of Mississippi in and for the city and parish and State aforesaid, personally
635 appeared Henry S. McComb, president, and Richard S. Charles, secretary, of the New Orleans, Jackson and Great Northern Railroad Company, who are personally known to me to be the identical persons who signed the foregoing as president and

secretary respectively, and acknowledged the same to be their voluntary act and deed for the purposes therein mentioned, and, being duly sworn, say that they are respectively the president and secretary of the said New Orleans, Jackson and Great Northern Railroad Company, and that they executed the foregoing instrument as such president and secretary of the said company and in behalf thereof, and that the seal affixed to the said instrument is the corporate seal of the said company and was affixed by the authority thereof.

And on the same day also appeared Edmond J. Forstall, to me personally known as one of the parties of the second part named in and who has subscribed the said foregoing instrument, and acknowledged that he executed and signed the same on the date thereof as his voluntary act and deed for the purposes therein mentioned.

In faith whereof I, as such notary public and as
636 [SEAL.] such commissioner of deeds, have hereto subscribed my name and capacity and affixed the official seals of my said offices at New Orleans the day and year above written.

[SEAL.] P. CHAS. CUVELLIER,
Notary Public, Parish of New Orleans, State of Louisiana.
P. CHAS. CUVELLIER,
Commissioner of Deeds of the State of Mississippi in New Orleans, La.

637 In the Circuit Court of the United States for the Southern District of Mississippi.

ILLINOIS CENTRAL RAILROAD COMPANY *et als.*
vs.
MISSI-PPI CENTRAL RAILROAD COMPANY *et als.*

Master's Report.

The undersigned, a special master under the decretal order rendered in this cause on the 14th day of October, 1876, has performed the duties imposed upon him in the same and now reports as follows:

1st. That in pursuance of the provisions of said decretal order he held sessions for taking proof in this cause at the same times and places, after the rendering of said decree, as those appointed by him in said cause under a decree of the district court of the United States for the northern district of Mississippi, and notified defendants' solicitors of the same, proof whereof is on file with
638 the master's report in said cause in the district court of the United States for the northern district of Mississippi.

Further, that he did, in the city of Jackson, Mississippi, on the 30th and 31st days of October, 1876, at the office of the clerk of the United States circuit court in said city, and from the 1st to the 15th day of November, 1876, inclusive, at the office of the clerk of the United States district court at Oxford, Mississippi, sit for the pur-

pose of taking the proofs aforesaid, after having previously given notice of such sittings for ten days by advertising the same in the Clarion, a newspaper published in Jackson, Mississippi, and in the Falcon, a newspaper published in Oxford, Mississippi, proofs whereof are herewith filed, marked respectively "A" and "B," and prayed to be taken as part hereof.

2d. I further report that the deed of trust bearing date the first day of May, 1872, made by the Mississippi Central Railroad Company to secure the payment of the principal and interest of a uniform issue of bonds therein described and in which the complain-
639 ants John Newell and Junius B. Alexander are named as trustees, with Edward J. Forstall, who is dead, has been established before me, and that the same is set forth in the exhibits to the bill and that it is operative and binding among all the parties to the same and the-r successors and assigns for all the purposes therein set forth. The Southern Railroad Association is a party to the said deed.

3d. I further report that the whole number of bonds therein described was issued, and that there have been sold and are now out*at*sanding three thousand seven hundred and twenty (3,720) bonds of one thousand dollars each, amounting to the sum of three million seven hundred and twenty thousand dollars ($3,720,000), and that there is in the hands of the said Alexander and Newell of the said issue of bonds the number of four thousand two hundred and eighty (4,280), amounting to the sum of four million two hundred and eighty thousand dollars ($4,280,000), which cannot be exchanged or sold and which I recommend shall be cancelled, and that no other debt be created under the said deed of trust by the parties to the said deed or by any of them.

640 4th. I further report that there was a default in the payment of the installments of interest due on those of said bonds which have been sold and circulated in the month of November, A. D. 1874, and in the month- of May and November, A. D. 1875, and in the month- of May and November, A. D. 1876, in the manner set forth in the schedule hereto annexed; that the complainant, The Illinois Central Railroad Company, was the holder of all the bonds set forth in the bill and Schedule A, hereto annexed, and that the demands made by them as such holders of the bonds owned by them upon the trustees authorized the trustees to bring and maintain this suit for the foreclosing of the mortgage therein contained and the sale of the property, and that they are entitled to enter and to hold possession of the property conveyed, and to use and operate the line of railroad, with all of its franchises and property, real and personal; to collect and receive the income and profits thereof for the purposes set forth therein.

5th. I further report that the said Mississippi Central Railroad Company and the Southern Railroad Association respect-
641 ively did convey to said trustees mentioned therein and the survivors of them and their heirs and assigns, as joint tenants, the railroad of the said Mississippi Central Railroad Company from Canton, in the State of Mississippi, to Jackson, in Tennessee,

and its proposed extension to the left bank of the Ohio river, opposite to the city of Cairo, with all of the franchises of the said company, all lands, railroad tracks, sidings, rights and privileges, station houses and grounds, depots and depot grounds, machine shops and the machinery used in or in connection therewith and all that may be acquired thereafter in any manner whatsoever in continuance of the said railroad to the Ohio and its operation, and that the said corporations did covenant and agree to execute and to deliver to the said trustees, and to their successors and assigns, further conveyances and assurances of the franchises and real and personal estate granted or intended to be granted to them by the terms of the said deed, and that under the terms of the said deed of trust there has passed and should now be vested in the trustees aforesaid and the survivor of them all of the corporate rights, franchises,
642 privileges, estates, and interests in the said railroad and other property, real and personal, whether in possession or action, with the stock held in said companies not disposed of, and the franchises and powers to consolidate with other companies, in order that the same may be sold and conveyed for the payment of the debts described in the deed of trust. I further report that the Mississippi Central Railroad Company has been consolidated since April, 1874, with the New Orleans, Jackson and Great Northern Railroad Company under certain agreements and statutes, and has assumed the liabilities and exercised the franchises, powers, and faculties of said corporation.

6th. I further report that there are due on the deed of trust the sums of money mentioned in Schedule "A," hereto attached, as having been proved to me according to the testimony taken and filed with my report in the case between the same parties in the district court of the United States for the northern district of Mississippi, at Oxford, Miss.

I report also that there are eleven hundred and four bonds of one thousand dollars each, amounting to one million one hundred and
643 four thousand dollars, with coupons, which have not been produced and proved, but which are outstanding, and that there ought to be some provision in any decree for the preservation of the interests of the holders of these bonds and that they should share in the benefits of this suit.

7th. I report that there is outstanding of the mortgages made by the Mississippi Central Railroad Company one bearing date the first day of November, 1854, in the form of a deed of trust to Charles Butler, Azariah G. Flagg, and Jacob Thompson. A number of the bonds and the holders thereof described in this deed have been proved to me, amounting to the sum of one hundred and eighty-one thousand nine hundred and ninety and $\frac{23}{100}$ dollars ($181,990.23), as will more fully appear from Schedule "B," hereto annexed as part of this report. I report that this deed of trust or mortgage is not impeached, and that its existence and validity are recognized in the deed of trust on which this suit is founded, and that all of the proceedings of sale and foreclosure should be made

without any prejudice to this mortgage or deed of trust and to the holders of the bonds, whether proved or not proved to me.

644 I further report that there is also outstanding of the mortgages made by the Mississippi Central Railroad Company a second mortgage in favor of Jacob S. Rogers, Daniel Ravenal, and William L. Shenkey, which bears date the 1st day of November, 1865, which provides for the issue of bonds not to exceed $2,000,000, and a number of which have been issued and are outstanding, in regard to which I report in the same manner as I have in reference to the first mortgage, except that the amount of bonds and coupons, &c., due thereon—and the holders thereof—proven to me amount to five hundred and thirty-nine thousand three hundred and ninety-three dollars and seventeen cents ($539,393.17), as will more fully appear from "Schedule C," herewith filed and made a part of this report.

I further report there is a first-mortgage lien upon so much of the railroad as lies in the State of Tennessee which the company is bound to pay under the statutes of the State of Tennessee made by the legislature of that State by an act passed the 11th day of February, 1852. The amount due to the State for principal and interest exceeds the sum of twelve hundred and fifty thousand dollars.

645 The cause of this debt and its validity are recognized in the deed of trust of the complainants, and the same are not impugned in the proceedings in this cause. I recommend the proceedings be without prejudice to them.

I report that there are other incumbrances on the property, but that the parties have not proved any claim under the same, and that the corporations which were interested as owners of the railroad are unable to pay the obligations and incumbrances on the same and are wholly insolvent. I recommend that the same be sold under the orders of this court.

8th. I report that the entire line of the railroad belonging to the Mississippi Central Railroad Company, extending from Canton, in the State of Mississippi, through the States of Tennessee and Kentucky, to the bank of the Ohio river, together with all the fixtures, furniture, rooling stock, and other moveables thereunto appertaintaining, with its extensions and branches and corporate rights, franchises, privileges, and immunities, including the capacity to be a corporation to consolidate and connect with other companies, its franchises and all its real and personal estate, and its rights and all its appurtenances to the said railroad, with the equipment and rights set forth in said deed of trust, is subject to the lien of

646 the said trust deeds in the order of their priority, except unless the fact, which I also report, that at the time said deed of the 1st of November, 1854, was executed said railroad terminated at the Mississippi and Tennessee State line should limit the operation of said deed to that portion of the road which lies in the State of Mississippi, and unless the further fact, which I also report, that at the time said deed of November 1, 1865, was executed said railroad terminated at Jackson, Tennessee, should limit the operation

of that deed to that portion of said road which lies in Jackson, Tennessee, and southward thereof.

The receiver has files an inventory of property in his possession on the — day of ——, 1876, which, although not complete, embraces in detail a large portion of the personal and real estate.

I report that the rolling stock in use on said road has probably been acquired and put on said road subsequent to the execution of said trust deeds of 1854 and 1865, and submit to the court the question as to whether as to such subsequently acquired property the said deeds of 1854 and 1865 are entitled to priority of
647 lien or only equality.

9th. I report that the same should be sold in bulk at public auction, at the city of Jackson, Mississippi, for cash, to the highest bidder, within the hours of sale by the trustees, under the direction and supervision of the master appointed in this cause, and that the deed to the purchaser be made under the powers and authority contained in the deed as well as the powers granted by this court; that the master join in the deed and that the president of the Mississippi Central Railroad Company and the president of the New Orleans, St. Louis and Chicago Railroad Company, as its successor, be required to join in the sale as confirming the same and append the seal of the company thereto; that the deeds be made under the directions of the master of this court; that there should be notice of the time and place of the sale published in a newspaper in New Orleans, in New York, and at Jackson, Mississippi, twice a week for eight weeks previously to the sale.

10th. I recommend that the bondholders or the holders of the majority of the bonds be authorized and empowered to bid at the sale for themselves and for such holders as may consent to
648 join with them, and in that case there be no requirement of a greater sum in cash than may be necessary to defray the costs and the expenses of the sale and the shares of such bondholders as may not consent to join with them within thirty days from the day of sale.

11th. I recommend that the receivers be required to settle their accounts and to ascertain the sum in their hands applicable to the debt ten days prior to the day of sale, and that should the entire debt be paid prior to the sale by the defendants that the sale be suspended.

Oxford, Miss., December 8, 1876.

G. R. HILL,
Special Master.

649 EXHIBIT A.

Notice.

In the District Court of the United States for the Northern District of Mississippi.

JOHN NEWELL, J. B. ALEXANDER, ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY, *et al.* } In Equity.

In pursuance to a decretal order made by said court in said cause the undersigned, as clerk and special master of said court, will, on the 16th and 17th days of October next, in the office of the clerk of the chancery court, in the city of Holly Springs, Miss., and on the 23d and 24th days of October next, in the office of the clerk of the chancery court, in the city of Grenada, Miss., and on the 30th
650 and 31st days of October next, in the office of the clerk of the circuit court of the United States, in the city of Jackson, Miss., and from the 1st to the 15th of November next, in the office of the clerk of the district court of the United States, in the city of Oxford, Miss., proceed to take proof of the amounts due the complainants or defendants, or other persons who may hold any of the bonds or coupons described in the deeds of trust filed with the bill or answers, and who may desire to claim under the decree in said cause, and whether the same be due upon bonds, coupons, or interest upon coupons, or otherwise under said deeds of trust.

G. R. HILL,
Special Master.

This September 12, 1876.

Notice.

In the District Court of the United States for the Northern District of Mississippi.

JOHN NEWELL, J. B. ALEXANDER, ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY, *et al.*

651 In pursuance *to* decretal order made by said court in said cause the undersigned, as clerk and special master of said court, will, on the 16th and 17th days of October next, in the office of the clerk of the chancery court, in the city of Holly Springs, Miss., and on the 23d and 24th days of October next, in the office of the clerk of the chancery court, in the city of Grenada, Miss., and

on the 30th and 31st days of October next, in the office of the clerk of the circuit court of the United States, in the city of Jackson, Miss., and from the 1st to the 15th of November next, in the office of the clerk of the district court of the United States, in the city of Oxford, Miss., proceed to take proof of the amounts due the complainants or defendants or other persons who may hold any of the bonds or coupons described in the deeds of trust filed with the bill or answers and who may desire to claim under the decree in said cause, and whether the same be due upon bonds, coupons, or interest upon coupons or otherwise under said deeds of trust.

This September 12, 1876.

G. R. HILL.
Special Master.

Sept. 20, '76, 4w.

652 In the United States Circuit Court for the Southern District of Mississippi.

SAME
vs.
SAME. } In Equity.

By order of said circuit court the proof taken and claims proven under the foregoing notice will also be reported by me to and become evidence and part of the proceedings in said cause in said circuit court.

GEORGE HILL,
Master Commissioner.

Oct. 18, '76, td.

THE STATE OF MISSISSIPPI, }
Hines County. }

Personally appeared before me, James H. Boyd, an acting justice of the peace in and for said county and State, J. L. Power, publisher of a newspaper printed and published in the city of Jackson, Hines county, Mississippi, called the Clarion, who, being sworn, deposes and says that the publication of a certain notice, a true copy
653 of which is hereunto affixed, has been made in said paper for eight weeks consecutively, to wit:

Vol. 39, No. 44, dated September 20, 1876.
" " 45, " September 27, 1876.
" " 46, " October 4, 1876.
" " 47, " October 11, 1876.
" " 48, " October 18, 1876.
" " 49, " October 25, 1876.
" " 50, " November 1, 1876.
" " 51, " November 8, 1876.

And I further certify that the numbers of the newspapers containing the above-mentioned notice have been produced before me and compared with the copy annexed, and that I find the publication thereof to have been correctly made.

J. L. POWER.

Witness my hand and seal this 6th day of December, 1876.

J. H. BOYD, *J. P.*

Printers' fees, $20.

Mr. G. R. Hill, special commissioner, to Clarion office, Dr.

DECEMBER 6, 1876.

To publishing annexed notice for the period above stated, $20. Received, Jackson, Mississippi, December 6, 1876, from G. R. Hill twenty dollars in full payment of the above account.

POWER & BARKSDALE,
For Clarion.

654 EXHIBIT B.

In the Circuit Court of the United States for the Southern District of Mississippi.

JOHN NEWELL, J. B. ALEXANDER, ILLINOIS CENTRAL R. R. COMPANY, *et al.*
vs.
MISSISSIPPI CENTRAL R. R. COMPANY, NEW ORLEANS, JACKSON AND GREAT NORTHERN R. R. COMPANY, *et al.*
} In Equity.

In the District Court of the United States for the Northern District of Mississippi.

JOHN NEWELL, J. B. ALEXANDER, ILLINOIS CENTRAL R. R. COMPANY, *et al.*
vs.
MISSISSIPPI CENTRAL R. R. COMPANY, NEW ORLEANS, JACKSON AND GREAT NORTHERN R. R. COMPANY, *et al.*
} In Equity.

655 In pursuance of a decretal order made by each of the said courts in said causes the undersigned, as special master of said courts, will on the 23d and 24th days of October, 1876, in the office of the clerk of the chancery court of the United States, in the city of Grenada, Miss., and on the 30th and 31st days of October, 1876, in the office of the clerk of the circuit court of the United States, in the city of Jackson, Miss., from the 1st to the 15th of November next, in the office of the clerk of the district court of the United States, in the city of Oxford, Miss., proceed to take proof of the amounts due the complainants or defendants or other persons who may hold any of the bonds or coupons described in the deeds of trust filed with the bills or answers and who may desire to claim under the decrees in said causes, and whether the same be due upon bonds, coupons, or interest upon coupons or otherwise under said deeds of trust.

G. R. HILL,
Special Master.

UNITED STATES OF AMERICA, }
N. Dist. of Miss., La Fayette County. }

656 Personally appeared before me, G. R. Hill, clerk, R. J. Guthrie, proprietor and publisher of a public newspaper printed in the town of Oxford, county and State aforesaid, called the Oxford Falcon, who, being first duly sworn, deposed and said that publication of a notice, of which a true copy is hereto affixed, has been made in said paper for two weeks—

In No. 49, dated the 20th day of Oct., A. D. 1876.
" 50, " 27th " " " "
" " " " " " " "
" " " " " " " "
" " " " " " " "
" " " " " " " "

said publication commencing on the 20th day of October, 1876, and ending on the 27th day of October, 1876.

R. J. GUTHRIE.

Sworn and subscribed before me this —.

——— ———.

UNITED STATES OF AMERICA, }
N. Dist. of Mississippi. }

I, G. R. Hill, clerk of the district court, do hereby certify that the several numbers of the newspapers containing the publication above mentioned and affixed have been produced before me, and I
657 have found the same and the proof thereof to be truly and correctly made.

Given under my hand and seal of office this the 14th day of Dec., 1876.

G. R. HILL,
Clerk U. S. Court, Northern Dist. Miss.

658 & 659 SCHEDULE A.—*Showing the Amount of Consolidated Gold Bonds Issued under the Third Mortgage by the Mississippi Central Railroad Company, with the Names of Creditors who have Proved the Amounts Proved, &c.*

Name of creditors.	Residence.	Amount principal.	Amount interest.	Aggregate amount due Dec. 1, 1876.
1. Illinois Central Railroad Company	Principal office, New York, N. Y.	$2,439,000	$445,791 03	$2,884,791 03
2. W. H. Osborn	New York, N. Y.	55,000	6,010 80	61,010 80
3. J. B. Alexander	" "	50,000	5,464 38	55,464 38
4. Cyrus M'Cormick	Chicago, Ill.	56,000	4,011 46	60,011 46
5. C. A. Rodney	Wilmington, Del.	1,000	72 04	1,072 04
6. P. E. Norton	Louisville, Ky.	13,000	1,420 74	14,420 74
9. Wade D. Rankin	Gaston Co., N. C.	2,000	18 58	2,218 58
Total amount proved		$2,616,000	$462,989 03	$3,078,989 03
Amount not proved		1,104,000	257,385 37	1,341,385 37
Total amount of said issue		$3,720,000	$700,374 40	$4,420,374 40

G. R. HILL, *Special Master.*

Filed Dec. 11th, 1876.
GEO. T. SWAN, *Clerk*

Name of creditor.	Residence.	Amount principal.	Amount interest.	Aggregate amount due Dec. 1, 1876.
7. James A. Price	Winsboro', N. C.	$1,000	$71 62	$1,071 62
8. M. Adelaide Brene	Charlotte, "	1,000	145 83	1,145 83
10. Sarah J. White	" "	4,000	583 33	4,583 33
11. A. B. Springs	" "	3,000	437 50	3,437 50
12. R. J. M'Dowell	" "	1,000	145 83	1,145 83
13. Jos. H. Wilson, ex'r Sarah Young, dec'd	" "	1,000	145 83	1,145 83
14. Rufus Barringer	" "	5,000	729 15	5,729 15
15. Adeline Rawlinson	York Co., S. C.	500	74 07	574 07
16. R. W. Brice	Chester Co., S. C.	1,000	145 83	1,145 83
17. Hugh White, adm'r A. White	" "	1,000	71 62	1,071 62
18. Margaret H. Gaston	" "	4,000	286 52	4,286 52
19. Mrs. Sallie Hemphill	" "	2,000	151 66	2,151 66
20. James Hemphill	" "	3,000	227 50	3,227 50
21. Mrs. Jane Hemphill	Fairfield Co., "	2,000	151 66	2,151 66
22. Mathew White	Chester Co., "	1,000	75 83	1,075 83
23. Wm. Caldwell	" "	4,500	322 29	4,822 29
24. F. B. Shuford	Holly Springs, Miss.	500	110 56	610 56
25. Holly Springs Sav. and Ins. Co.	" "	4,000	140 81	4,140 81
26. W. S. Featherston	" "	6,000		6,000 00
27. Jas. T. Fant	" "	3,500	123 21	3,623 21
28. Alex. M. Clayton	Lamar, Miss.	12,000	775 83	12,775 83
29. Jas. Collins	Galveston, Tex.	5,000	729 16	5,729 16
30. Mary L. Hull, wife of Wm. Hull	Benton Co., Miss.	10,500	369 64	10,869 64
31. Gordentia Waite	Holly Springs, Miss.	500	17 60	517 60
32. Mrs. Barbara A. Clayton	Lamar, "	8,000	105 60	8,105 61
33. J. W. Fant	Holly Springs, "	1,500	107 43	1,607 43
34. Miss Helen B. Fant	" "	500	35 81	535 81
35. Jno. M. Anderson	" "	7,000	467 67	7,467 67
36. Southern In. Works	" "	1,000	35 20	1,035 20
37. Mrs. C. O. West	" "	10,500	369 64	10,869 64

38.	Estate A. H. Pegues	Oxford, "	10,500		10,500 00
39.	Mrs. V. F. Beatty	Vaiden, "	500	92 96	592 96
40.	Mrs. E. L. Mayes	Oxford, "	1,000		1,000 00
41.	Chas. B. Howry	St. Louis, Mo.	2,000	143 25	2,143 20
42.	G. W. Norton	Louisville, Ky.	5,500	764 97	6,264 97
43.	Walter A. Goodman	Memphis, Tenn.	8,500		8,500 00
44.	Montford Jones	Canton, Miss.	14,000	227 50	14,227 50
45.	Sam. Frank	Holly Springs, Miss.	2,500	88 01	2,588 01
46.	Francis T. Willis	Richmond, Va.	1,500	218 75	1,718 75
47.	John Morrow	Richland, Miss.	1,000		1,000 00
48.	Owens & Bro.	Oxford, "	1,000	145 83	1,145 83
49.	Mrs. E. C. Owens	Grenada, "	500	" "	500 00
50.	Orman L. Kimbrough	" "	500	72 91	572 91
51.	Mrs. C. L. Glover	" "	1,500	52 80	1,552 80
52.	John M'Bride	Vaiden, "	500	72 91	572 91
53.	Sam. Laurence	Grenada, "	1,000	90 51	1,090 51
54.	Mrs. E. J. Ingram	" "	1,000	145 83	1,145 83
55.	L. C. Majet	" "	1,000	35 20	1,035 20
56.	C. C. Majet	Unknown	1,500	108 10	1,608 10
57.	Ill. Cen. R. R. Co.	New York		10,310 23	10,310 23
112.	Sarah Tucker	Lincoln Co., N. C.	1,000	145 83	1,145 83
114.	M. J. Rankin	Charlotte, "		120 40	120 40
	Total amount proved		$62,000	$19,990 23	$181,990 23

Name of creditor.	Residence.	Amount principal.	Amount interest.	Aggregate amount due Dec. 1, 1876.
7. James A. Brice	Winsboro', S. C.	$1,000	$82 30	$1,082 30
9. Wade D. Rankin	Gaston Co., "	2,800	230 53	3,030 53
10. Sarah J. White	Charlotte, N. C.	500	183 56	683 56
11. A. B. Springs	" "	3,400	1,184 04	4,584 04
12. R. J. M'Dowell	" "	24,700	11,753 72	36,453 72
13. J. W. Wilson, ex'r Sarah Young, dec'd	" "	3,200	1,639 97	4,339 97
14. Rufus Barringer	" "	5,300	2,088 88	7,388 88
15. Adeline Rawlinson	York Co., S. C.	100	17 24	117 24
16. R. W. Brice	Chester Co., S. C.	2,500	955 16	3,455 16
18. Margaret H. Gaston	" "	1,000	525 00	1,525 00
20. James Hemphill	" "	3,600	1,513 73	5,113 73
21. Mrs. Jane W. Hemphill	Fairfield Co., "	700	278 96	978 96
22. Mathew White	Chester Co., "	2,500	1,091 16	3,591 16
23. Wm. Caldwell	" "	1,300	549 69	1,849 69
31. Gordentia Waite	Holly Springs, Miss.	5,100	637 50	5,737 50
37. Mrs. C. O. West	" "	11,500	40 00	11,540 00
38. Estate A. H. Pegues	Oxford, "	1,000	1,273 89	2,273 89
41. Chas. B. Howry	St. Louis, Mo.	5,200	428 33	5,628 33
42. G. W. Norton & Bro.	Louisville, Ky.	102,600	38,923 81	141,523 81
44. Montford Jones	Canton, Miss.	5,800	477 51	6,277 51
45. Sam. Frank	Holly Springs, Miss.	----------	280 00	280 00
58. Thos. L. Johnson	Rock Hill, S. C.	----------	321 06	321 06
59. J. Lander Adams	Chester Co., "	400	32 93	432 93
60. Robert S. Hughes	Paterson, N. J.	1,000	508 30	1,608 30
61. Tunis Stagg	" "	1,400	653 55	2,053 55
62. Estate Theodore Rogers	" "	8,500	3,636 46	12,136 46
63. Mrs. Mary E. Burns	" "	3,000	246 99	3,246 99
64. Estate Jason Rogers	New York, N. Y.	10,000	4,620 63	14,620 63
65. C. B. Rogers	" "	22,300	5,633 28	27,933 28
66. J. S. Rogers	" "	61,700	32,781 30	94,481 30

67.	William S. Hudson	Manchester, "	3,000	1,386 19	4,386 19
68.	Russel M. Right	Easthampton, Mass.	7,000	2,959 49	9,959 49
69.	Mrs. C. J. Lake	Grenada, Miss.	1,000	82 33	1,082 33
70.	Mrs. Kate Donkin	" "	3,300	134 15	3,434 15
71.	W. C. & M. C. Pegues	Marshall Co., Miss.	1,500	123 49	1,623 49
72.	Owens & Bro.	Oxford, "		100 00	100 00
73.	Robert N. Hemphill	Chester Co., S. C.		356 00	356 00
74.	J. J. M'Lure	C. H., "	1,700	1,445 29	3,145 29
75.	Isaac D. Witherspoon, trustee	Yorkville, "	9,000	1,124 81	10,124 81
76.	Charles S. Brice	Chester C. H., "	600	286 72	886 72
77.	Rev. R. W. Brice	" "	700	197 61	897 61
78.	Mrs. Juliet A. Wylie	" "	6,000	3,004 60	9,004 60
79.	Mary Hutchinson	Rock Hill, "	3,100	1,263 53	4,363 53
80.	Ann White	York Co., "	1,000	362 32	1,362 32
81.	G. D. Heath	Chester, "		885 33	885 33
82.	Mary E. White	York, "	13,000	624 34	13,624 34
83.	R. Barringer	Charlotte, N. C.		370 48	370 48
84.	Mary E. Davidson	Lincolnton, "	100	118 08	218 08
85.	William T. Shipp	" "	200	16 46	216 46
86.	Martha M. Rankin	Charlotte, N. C.	200	16 46	216 46
87.	Jos. H. Wilson	" "	300	143 36	443 36
88.	Wm. Johnston	" "	1,400	605 61	2,005 01
89.	Sam'l E. White	Fort Mill, S. C.	500	41 16	541 16
90.	Thos. L. Johnston	York Co., "	1,000	82 63	1,082 33
91.	James M. Brawley	" "		1,328 00	1,328 00
92.	J. L. Harris, trustee	" "	3,400	1,226 60	4,626 60
93.	Jas. T. Walker	Holly Springs, Miss.	200	8 13	208 13
94.	F. B. Shuford	" "	2,500	760 33	3,260 33
95.	H. Springs Sav. and Ins. Co.	" "	4,500	901 70	
96.	Lewis Thompson	" "	1,500	614 33	2,114 33
97.	Lewis H. Days	Saulsbury, Tenn.	1,000	213 33	1,213 33
98.	W. S. Featherson	Holly Springs, Miss.	5,500		5,500 00
99.	Estate A. C. M'Ewen	" "	500		500 00
100.	Jas. T. Fant	" "	500	151 83	651 83
101.	J. T Pickett	" "	2,600	214 06	2,814 06
102.	Scruggs, Hull & Co.	" "	500	41 16	541 16
103.	B. G. West	" "	200		200 00
104.	Estate of Harriet M. Rice, dec'd	" "	700	28 40	728 40
105.	R. Schumaker	" "	500	41 16	541 16

Schedule C—Continued.

Name of creditor.	Residence.	Amount principal.	Amount interest.	Aggregate amount due Dec. 1, 1876.
106. M. C. Pegues	Marshall Co., Miss.	$2,000	$164 66	$2,164 66
107. Charles Schneider	Holly Springs, Miss.	4,000	329 33	4,329 33
108. Robert Roth	" "	3,000	247 00	3,247 00
109. L. Shearman	Coffeeville, "	2,000	33 73	233 73
110. G. W. Norton & Co.	Louisville, Ky.	14,000	1,886 64	15,886 64
111. Chas. Roberts	Oxford, "	4,800	395 20	5,195 20
113. Miles P. Pegram	Charlotte, S. C.	1,700	1,846 68	3,546 68
114. M. J. Rankin	" "		41 28	41 28
Total amount proved		$400,600	$138,793 17	$539,393 17

Filed Dec. 11, 1876.
GEO. T. SWANN, *Clerk.*

G. R. HILL, *Special Master.*

670 UNITED STATES OF AMERICA, }
Southern District of Mississippi, } *sc:*

I, James M. McKee, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed thirty-one pages contain a true and complete transcript of the report of the special master of bonds proved, made to said court in the cause therein stated, as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office, in Jackson, in said district, this 26th day of May, in the year of our Lord 1885.

[SEAL.] JAS. M. McKEE, *Clerk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *sc:*

I, R. A. Hill, district judge of the United States for the State of Mississippi, hereby certify that Jas. M. McKee, whose genuine signature appears to the above attestation, was at the date thereof and yet is clerk of said court, duly appointed and qualified as such; that his signature thereto is genuine, and that said attestation is in due form and by the proper officer.

671 Given under my hand and private seal (having no official seal), at Jackson, Miss., this 26th day of May, A. D. 1885, and of our Independence the one hundred and eighth.

R. A. HILL,
U. S. Judge for Mississippi.

Decree of Sale.

In the Circuit Court of the United States for the Southern District of Mississippi, November Term, A. D. 1876.

FRIDAY, *Dec.* 22, 1876.

ILLINOIS CENTRAL RAILROAD COMPANY, JOHN NEWELL, JUNIUS B. ALEXANDER
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, NEW ORLEANS, ST. LOUIS AND CHICAGO RAILROAD COMPANY, SAMUEL H. EDGAR, GEORGE H. BATES, SOUTHERN RAILROAD ASSOCIATION.

672 This cause was submitted to the court upon the bill, answers, exhibits, orders, and decrees, and other proceedings in the cause, all parties appearing by solicitors, and the court, upon consideration of the pleadings and proceedings, declares, orders, and decrees that the deed of trust of the Mississippi Central Railroad Company bearing date the 1st day of May, 1872, and described in the bill and appended thereto as an exhibit to the same has been established and is a valid conveyance; the plaintiffs John Newell and Junius B. Alexander are the surviving trustees (Edmund J. Forstall being dead) and seized and possessed of all the rights and property thereby conveyed; that the Illinois Central Railroad Company has proved the debt claimed in the bill as alleged in the bill,

and that there has been a default in the payment of the installment of interest falling due on the bonds secured by the terms of the deed after a proper demand in November, A. D. 1874, and as each succeeding instalment of interest became due in May and November after that first default, and that the holders of more than two thousand bonds have demanded of the trustees to maintain this suit.

673 The court also declares that the New Orleans, Jackson and Great Northern Railroad Company and the Mississippi Central Railroad Company have been consolidated under acts of the legislature- of Louisiana, Mississippi, Tennessee, and Kentucky, under the name of the New Orleans, St. Louis and Chicago Railroad Company and agreements between them.

2. The court orders and decrees that the trustees aforesaid, in person or by attorneys, are entitled to enter into and take possession of the property, estates, franchises, and privileges described in the deed, and to operate, use, and manage the same according to the terms of the deed and the orders and directions of this court until the same be otherwise disposed of.

3. The court orders and decrees that the report of G. R. Hill, special master appointed by this court to ascertain the amount of the debt due on the bonds outstanding and which are secured by the said deed of trust, be confirmed in respect to the said debt, and that the coupons of interest remaining unpaid are entitled to satisfaction from the proceeds of the sale of the property described in the deed of trust, unless the same be paid by the defendants to the bill before the sale.

674 4. The court orders and decrees that the said defendants pay into the registry of this court the sum of four hundred and sixty-two thousand nine hundred and eighty-nine $\frac{8}{100}$ dollars in gold coin for the use of the trustees, this being the aggregate sum proved to be due upon the coupons of interest because of the default of the defendants on or before the 15th day of January next and also the costs of this suit, and that in aid of this payment any surplus in the hands of the receiver may be likewise applied, and upon such payment being made no action shall be taken upon this order and decree until the court shall direct.

5. The court orders that if there be no payment of the debt and costs within the time aforesaid the plaintiffs Newell and Alexander or their solicitor or solicitors may, under the directions and supervision of the special master heretofore appointed, cause an advertisement for the sale of all the property described in the said deed of trust, being the railroad of the said Mississippi Central Railroad Company and of the New Orleans, St. Louis and Chicago Railroad Company, extending from the town of Canton, in the State of

675 Mississippi, northwardly through Mississippi to Jackson, in Tennessee, and its extension therefrom to the left bank of the Ohio river, with all the extensions and branches thereof, with all the franchises of the said Mississippi Central Railroad Company, including the franchises existing at the date of the said deed of trust, as well as those acquired by any subsequent legislation, and

the franchise for uniting, connecting, and consolidating with other corporations, together with all of the lands, railroads, trucks, sidings, rights and privileges, station-houses and grounds, depots and depot grounds, machine shops and machinery used in connection with the same, engines, cars, rolling stock, and apparatus of every description used with the said railroad or which had been acquired, and all the stock of the said corporation or its successors remaining unsold and held for said corporation, the sale to be at the city of Jackson, in the State of Mississippi, before the court-house of this court, between the hours of noon and of 3 o'clock p. m., at some day to be designated in the advertisement and to be fixed by the master.

The advertisement shall be published three times a week in
676 a paper published in Jackson, Mississippi, and also in one published in the cities of New Orleans and New York respectively for eight weeks prior to the day of sale; the sale shall be made of the property in bulk and for cash to the highest bidder; it shall be attended by the master, who shall superintend the same, and the trustees or their solicitor or solicitors, who shall see that the same is fairly conducted according to the practice of the court, and who shall report the same to this court within ten days after its consummation.

6. The court orders and decrees that the holders of a majority of all of the bonds issued by the trustees under the said deed of trust shall be at liberty to appoint one or more persons as a committee, who shall have power to buy in the property for the benefit of all of such of the bondholders aforesaid who may elect to become interested in the purchase within ten days from the day of the sale to them. Each of the said bondholders who may elect to become interested shall have an interest corresponding and proportionate to the amount of the debt proved under the decree. The committee making the purchase shall have power to receive the
677 property from the trustees, together with a deed from the master and the trustees and the corporations aforesaid, which shall be executed by the president of the board of directors for the said corporation and to seal the same with their seal, and said committee shall manage the property till there be an organization of the company composed of the parties interested.

7. In the event of the purchase by the said committee it shall not be necessary for the purchasers to pay in cash any portion of the bid until ten days shall elapse from the day of sale, and then only so much as shall be necessary to pay the *pro rata* share of the bondholders who may not elect to join in the purchase after deducting the costs and expenses.

8. The court orders and decrees that all of the issue of bonds described in the consolidated mortgage bearing date the first day of May, 1872, and which is appended to the bill, which have not been sold or exchanged by the trustees and remain in the hands of the trustees be cancelled by them, and that none of them shall have any force or validity from this decree.

678 9. The court orders and decrees that the receiver appointed by this court make a settlement before the master with the

trustees of all his accounts prior to the day of sale, and that he be allowed for the current expenses, and whatever balance may be in his hands, which is applicable to the debt, be paid over to the trustees to be disposed of under the terms of the deed of trust.

10. The court orders and decrees that nothing in the order and proceedings of this cause or in this decree or what shall be done under it shall have any effect or operation to impair, modify, or diminish any right, title, claim, or interest of the holders of the bonds or the securities issuing from or secured by the terms of the deed of trust referred to in the consolidated mortgage aforesaid as having been executed by the Mississippi Central Railroad Company, dated the first day of November, A. D. 1854, in favor of Charles Butler, Azariah C. Flagg, and Jacob Thompson; the deed of trust dated the first day of November, A. D. 1865, to Jacob S. Rogers, W. P. Matheson, and William L. Sharkey, and the debt contracted with the State of Tennessee for bonds advanced for construction purposes,
679 according to the provisions of a statute of that State approved eleventh of February, A. D. 1852, entitled "An act to establish a system of internal improvements in this State." These mortgages and the debts and obligations validly existing under the same are recognized as charges upon the property aforesaid, according to the legal meaning and effect of the same, without detriment from anything herein contained.

11. The costs of the cause will be paid by the trustees from the funds which may come into their hands.

12. All questions of equity not hereinbefore disposed of, whether arising on the master's reports or from any orders or proceedings, are reserved until the coming in of the master's report. The master will make a report upon the allowances to be made to the trustees for compensation and for expenses.

13. All of the rights and equities of parties who are not before the court as parties or privies to those parties who have been served with process are reserved in all of their integrity and legal effect.

14. It is further ordered that the receiver, R. P. Neely, now
680 holding the property, be continued in his functions until the further order of this court, not to extend beyond the day of sale, and that he make a settlement of all his accounts before that date, so as to be able to surrender the same at that date.

15. All questions as to how far the first and second mortgages extend or how much or what part of the railroad, its property, franchises, &c., mentioned in said deed of May 1st, 1872, is covered by said first mortgage, executed in 1854, or said second mortgage, executed in 1865, are expressly reserved.

This December 22, 1876.

R. A. HILL, *Judge.*

UNITED STATES OF AMERICA,
Southern District of Mississippi, } *sc:*

I, Jas. M. McKee, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed five and one-half pages contain a true and complete transcript of the decree

for sale of property made by said court in the cause therein
681 stated as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of our said court, at office, in Jackson, in said district, this 31st day of July, in the year of our Lord 1885.

JAS. M. McKEE, *Clerk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *sc.:*

I, R. A. Hill, district judge of the United States for said district, hereby certify that Jas. M. McKee, whose genuine signature appears to the above attestation, was at the date thereof and yet is clerk of said court, duly appointed and qualified as such; that his signature thereto is genuine, and that said attestation is in due form and by the proper officer.

Given under my hand and private seal (having no offi-
[SEAL.] cial seal), at Jackson, this 1st day of August, A. D. 1885, and of our Independence the one hundred and tenth.

R. A. HILL,
U. S. District Judge for Mississippi.

682 *Master's Report of Sale.*

Circuit Court of the United States, Southern District of Mississippi.

JOHN NEWELL, JUNIUS B. ALEXANDER, and THE ILLINOIS CENTRAL RAILROAD COMPANY
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, NEW ORLEANS, ST. LOUIS and CHICAGO RAILROAD COMPANY, SOUTHERN RAILROAD ASSOCIATION, SAMUEL H. EDGAR, and GEORGE H. BATES.

To the honorable the judges of the circuit court of the United States for the southern district of Mississippi:

The undersigned, special master in the above-entitled cause, who,
683 by the decree made and entered in the circuit court of the United States, southern district of Mississippi, on the 22d day of December, 1876, at the November term of said court, A. D. 1876, in the original cause then pending in said court, and also by decree of the district court of the United States for the northern district of Mississippi on the 17th day of January, 1877, in a similarly entitled cause, which is ancillary to the original cause aforesaid, and by a decree entered in the circuit court of the United States for the western district of Tennessee under an ancillary bill in said court filed therein by said complainants on the 6th day of January, 1877, and also by a decree of the circuit court of the United States of the district of Kentucky, at Paducah, between the parties aforesaid, entered on the 5th day of January, 1877, the three last-mentioned causes being ancillary to the main cause in the circuit court of the United States for the southern district of Mississippi aforesaid, was required to carry out the said decrees

with regard to the advertisement and conduct of the sale of the entire property, rights, and franchises, &c., of the Mississippi Central Railroad Company under the terms of the deed of trust as made by the Mississippi Central Railroad Company and the Southern
684 Railroad Association to Edmond J. Forstall, John Newell, and Junius B. Alexander, their successors and assigns, and established in said decrees—

Respectfully reports that upon due application by the solicitor of the said John Newell and Junius B. Alexander, surviving trustees, advertisements or notices announcing the sale of said property were inserted in the following-named newspapers, published in the cities of New Orleans, Louisiana; New York, New York, and Jackson, Mississippi (to wit), in the Picayune, published in the city of New Orleans, Louisiana, and in the Jackson Times, published in Jackson, Mississippi, and the New York World and Tribune, published in New York city, State of New York. The said advertisement stated that the sale would be made on Thursday, the twenty-sixth (26th) of April, 1877, before the door of the court-house of the circuit court of the United States, in Jackson, Mississippi. The said advertisements were published in the New York Tribune and World three times a week for the full period of eight weeks and in the Jackson Times, published at Jackson, Mississippi, and in the Picayune every day for the full period of eight weeks prior to the day ap-
685 pointed as aforesaid for the sale of the property.

Prior to the day of sale aforesaid, by order of the several courts aforesaid in this cause, said sale was allowed to be suspended for not exceeding four months from the day of sale fixed as aforesaid in said advertisements and was, in fact, suspended under the said order of the court and the request of complainants.

The undersigned would further report that, upon due application by the solicitor of the said John Newell and Junius B. Alexander, surviving trustees, and under and by virtue of the directions of said decrees of the 22d day of December, 1876, aforesaid and the other decrees aforesaid, he caused advertisements or notices anouncing said sale of the said property to be inserted in the following-named newspapers (to wit), the New Orleans Times, published in New Orleans, Louisiana, and the Jackson Times, published in Jackson, Mississippi, and in the New York World and the New York Tribune, published in the city of New York, State of New York.

The said advertisement stated that the sale would be made
686 on Thursday, the twenty-third (23d) day of August, A. D. 1877, before the door of the court-house of the circuit court of the United States, in Jackson, Mississippi.

The said advertisements were published in the New York World and Tribune and the New Orleans Times aforesaid three times a week for the full period of eight weeks prior to the sale and in the Jackson Times, published at Jackson, every day for the full period of eight weeks prior to the sale in accordance with the directions in said decrees contained; all of which will fully appear by reference to the proofs of publication, with copies of said advertisements at-

tached thereto, and which are hereto annexed, marked Exhibits A, B, C, and D, and made parts of this report.

The undersigned further reports that, by virtue of the authority in him vested by the decrees aforesaid, he appointed C. S. Wood, of Oxford, Mississippi, crier for the purpose of making the sale of the property and franchises of the said Mississippi Central Railroad Company and Southern Railroad Association described in the deed of trust aforesaid, in the inventories on file, and the notices
687 of sale aforesaid. Copy of said appointment is annexed, marked "E." The undersigned further reports that on Thursday, the 23d of August, 1877, between the hours of 12 m. and three o'clock p. m., before the door of the court-house of the circuit court of the United States in the city of Jackson, Mississippi, the said property and franchises were put up for sale to the highest bidder and last bidder at public outcry after due reading by the crier in my presence and that of the solicitor for the trustees of the advertisement of sale and of the terms and conditions of said sale, and also the reading by me of so much of the decrees as pertained to the sale, and also an abstract statement of the memorandum of agreement filed by the bondholders on the 8th day of August, 1877, and the names of the persons selected and appointed as a committee by the bondholders for the purchase of said property.

I also read sections ten and fifteen of said decrees as to the first and second mortgages as follows:

SECTION 10. The court orders and decrees that nothing in the orders and proceedings of this cause or in this decree or what shall be done under it shall have any effect or operation to impair,
688 modify, or diminish any right, title, claim, or interest of the holders of the bonds or the securities issuing from or secured by the terms of the deeds of trust referred to in the consolidated mortgage aforesaid as having been executed by the Mississippi Central Railroad Company, dated the first day of November, A. D. 1854, in favor of Charles Butler, Azariah C. Flagg, and Jacob Thompson.

The deed of trust, dated the 1st day of November, A. D. 1865, to Jacob S. Rogers, M. P. Mathison, and William L. Sharkey and the debt contracted with the State of Tennessee for bonds advanced for construction purposes according to the provisions of a statute of that State approved eleventh of February, A. D. 1852, entitled "An act to establish a system of internal improvements in this State." These mortgages and the debts and obligations validly existing under the same within the extent and operation of the same are recognized as charges upon the property aforesaid according to the legal meaning and effect of the same without detriment from anything herein contained, and section 15, as follows: All questions as to how far the said 1st and 2d mortgages extend or how
689 much or what part of the railroad, its property, franchises, &c., mentioned in the said deed of May 1, 1872, is covered by the said 1st mortgage executed in 1854 or the said 2d mortgage executed in 1865 are expressly reserved.

I also exhibited the inventories heretofore filed by the receivers

in the circuit court of the United States at Jackson, Mississippi, and invited any person desiring to do so to examine the same and stated the terms and conditions of the sale as advertised.

Whereupon I directed the crier to proceed to sell the said property and franchises "in bulk for cash to the highest bidder," when, after due offering the said property and franchises as described in the deed of trust foreclosed in these causes and in the inventories and notices of sale, it was, under my direction, adjudicated to William H. Osborn, Lewis E. Simonds, Benjamin F. Ayer, Constantine Menelas, William Alexander Gordon, and John Dunn, the purchasing committee aforesaid, for the price and sum of four hundred and twenty-five thousand dollars, they being the highest and last bidders thereon. The undersigned further reports that the sale in all respects was conducted publicly and fairly, without any irregularity or
690 neglect on the part of the trustees.

Ample time was given to all bidders and the adjudication was made as I directed.

The report of the crier, marked (F), and the memorandum of agreement of bondholders, marked (G), are submitted herewith.

I further report that the inventories of the said property, movable and immovable, were filed in the office of the clerk of the United States circuit court prior to said sale and were open to the inspection of all persons.

G. R. HILL,
Special Master.

EXHIBIT A.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

P. T. Hubbard, of said city, being duly sworn, says that he is and during the whole time hereinbefore mentioned has been the principal clerk in the office of the World, a newspaper printed in the city of New York, and that the notice, of which the annexed
691 is a copy, was published in the said newspaper three times in each week for eight weeks successively, commencing on the 11th day of June last past.

P. T. HUBBARD.

Sworn before me this 7th day of August, 1877.

LEONARD MINEESE,
Notary Public.

Notice of Adjourned Sale of Mississippi Central Railroad.

Circuit Court of the United States for the Southern District of Mississippi.

JOHN NEWELL and J. B. ALEXANDER, Surviving Trustees, &c., and THE ILLINOIS CENTRAL RAILROAD COMPANY
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, NEW ORLEANS, ST. Louis and Chicago Railroad Company, Southern Railroad Association, and Others.

692 Under and by virtue of the power and authority conferred by the circuit court of the United States for the southern district of Mississippi in a decree rendered in the above-entitled cause on the 22d of December, 1876, and also by virtue of a decree of the United States circuit court for the western district of Tennessee, between parties aforesaid and others, rendered on the 6th day of January, 1877, and by virtue of a decree entered on the 5th day of January, 1877, in the circuit — of the United States for the district of Kentucky, at Paducah, between the parties aforesaid, and by virtue of a decree entered in the district court of the United States for the northern district of Mississippi between the above-named parties and others on the seventeenth day of January, 1877, and under and by virtue of the terms of the deed of trust established in said decrees as made by the Mississippi Central Railroad Company in favor of Edmond J. Forstall, John Newell, and Junius B. Alexander, their successors and assigns, bearing date the first (1st) day of May, 1872, and to provide for the payment of the debts therein described, we, the undersigned, surviving trustees, will sell at public auction, to the highest bidder, under the superintendence and direction
693 of G. R. Hill, special master in the above-entitled causes, as provided and directed in the said decrees, the entire property embraced in the said deed of trust, at the city of Jackson, Miss., before the door of the court-house of the circuit court of the United States, in Jackson, Miss., between the hours of noon and 3 o'clock p. m., on Thursday, the twenty-third (23d) day of August, A. D. 1877, the property described in said decrees and the deed of trust aforesaid, being the railroad of the said corporation (the Mississippi Central Railroad Company); and of the New Orleans, St. Louis and Chicago Railroad Company, commencing in the city of Canton, in the State of Mississippi, and extending northwardly through Mississippi and Tennessee to Jackson, Tennessee, and its extension therefrom through Tennessee and Kentucky to the left bank of the Ohio river, opposite Cairo, Ill., with all the extensions and branches thereof, with all the franchises of the said Mississippi Railroad Company, including the franchises existing at the date of said deed of trust aforesaid, as well as those acquired by any subsequent legislation or otherwise, and the franchise for uniting, connecting, and con-
694 solidating with other corporations, together with all the lands, railroad tracks, sidings, rights, privileges, and immunities,

station-houses and grounds, depots and depot grounds, machine shops, and machinery used in or in connection with the same, all engines, cars, rolling stock, and apparatus of every description used on or in connection *of* said railroad or which has been acquired, and all the stock of said corporation or its successors remaining unsold or held for said corporation, and all repair shops, business houses, offices, buildings, and furniture, fuel, and all materials used for the operation and business of the road, car-houses, freight-houses, and all lands and all and every other kind and description of rights, powers, privileges, immunities, titles, legal and equitable, and property of all kinds covered by said deed of trust aforesaid, with the power to operate said road and to collect the income, rents, and tolls therefrom, and all the right, title, and estate of the said corporation and its assigns as fully as the same are granted in the deed of trust aforesaid or the decrees of the courts aforesaid.

695 The sale of said property to be made in bulk for cash to the highest bidder at the time of sale.

The right of the bondholders to purchase the said property is reserved in the decrees.

JOHN NEWELL,
JUNIUS B. ALEXANDER,
Surviving Trustees.

G. R. HILL,
Special Master.

N. B.—Inventories of the property, as far as ascertained, have been filed in the United States circuit court, Jackson, Miss., aforesaid, which can be seen on application to the clerk of said court.

EXHIBIT B.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Thomas N. Rooker, being duly sworn, saith that he is the foreman in the office of the New York Daily Tribune, a newspaper printed in the city of New York; that the advertisement hereto annexed has been regularly published in the said New York Daily Tribune three times a week for eight weeks successively,

696 commencing on the ninth day of June, 1877.

THOMAS N. ROOKER.

Sworn to before me this 2d day of August, A. D. 1877.

CHARLES TAPPAN,
Notary Public, Kings Co. and N. Y. Co., N. Y.

(See copy notice annexed to Exhibit A.)

EXHIBIT D.

THE STATE OF MISSISSIPPI, }
Hinds County. }

Personally appeared before me, John McGill, mayor of Jackson and an acting justice of the peace in and for said county and State, Walter Davis, foreman of a newspaper printed and published in the city of Jackson, Hinds county, who, being duly sworn, deposes and says that the publication of a certain notice, a true copy of which is hereunto affixed, has been made in said paper for two months
697 and fifteen days consecutively, to wit:

Commenced in vol. 11, No. 134, dated Wednesday, June 5, 1877; ended in vol. 11, No. 202, dated Wednesday, August 22, 1877.

And I further certify that the several numbers of the newspapers containing the above-mentioned notice have been produced before me, compared with the copy annexed, and that I find the publication thereof to have been correctly made.

WALTER S. DAVIS.

Witness my hand and seal this 23d day of August, 1877.

JOHN McGILL,
Mayor and J. P.

Printer's fees, $1.00.

M. G. R. HILL,
Special Master.

Miss. Cent. R. R. to Daily Times Office, Dr.

698 To publishing adv. sale of road, 10 squares, daily, 2 months 10 days ---------- $60 00

Received, Jackson, Miss., Aug. 23, 1877, from —— —— sixty-one dollars, in full payment of the above account.

J. L. LAKE, JR.,
For Times.

(See copy notice annexed to Exhibit A.)

EXHIBIT E.

In the Circuit Court of the United States, Southern District of Mississippi.

JOHN NEWELL, J. B. ALEXANDER, and THE ILLINOIS CENTRAL RAILROAD COMPANY }
vs. }
THE MISSISSIPPI CENTRAL RAILROAD COMPANY *et als.* }

SIR: By virtue of the authority in me vested by a decree
699 rendered in the above cause on the 22d day of December, 1876, and by virtue of the authority in me vested by decree

of circuit court of United States at Paducah, Ky., and of the circuit court of United States at Memphis, Tennessee, and by district court of United States at Oxford, Mississippi, in causes ancillary to the said cause in the circuit court of the United States for southern district of Mississippi, I hereby appoint you as crier to make the sale of the Mississippi Central railroad on the 23d of August, 1877, this the 22d day of August, 1877.

G. R. HILL,
Special Master.

To C. S. Wood, Oxford, Miss.

Ex. E.

700 EXHIBIT F.

Circuit Court of United States, Southern District of Mississippi and Western District of Tennessee and District of Kentucky, at Paducah, and District Court of United States at Oxford.

JOHN NEWELL, J. B. ALEXANDER, ILLINOIS CENTRAL RAILROAD COMPANY
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, SOUTHERN RAILROAD ASSOCIATION, NEW ORLEANS, ST. LOUIS AND CHICAGO RAILROAD COMPANY.

JACKSON, MISSISSIPPI, *Aug.* 23, '77.

To G. R. Hill, special master:

In compliance with my duty as crier under your appointment to sell the property, estate, rights, franchises, &c., of the Mississippi Central Railroad Company, I respectfully report, that
701 the said property, estates, rights, and franchises, &c., was offered at public sale, before the door of the court-house of the circuit court of the United States, in Jackson, Mississippi to the highest and last bidder, pursuant to the notices of sale, after due reading thereof, and after announcing the terms and conditions of the sale according to the decrees, and duly crying the same, and having given ample opportunity to all bidders, the said property, &c., was adjudicated to the highest and last bidder thereon, to wit: William H. Osborn, Lewis E. Simonds, Benjamin T. Ayer, Constantine Menelas, William Alexander Gordon and John Dunn, the purchasing committee of the holders of the bonds of said Mississippi Central Railroad Company, for the price and sum of four hundred and twenty-five thousand dollars.

The said adjudication was made in the presence of James Fentress, Esq., solicitor of John Newell, and Junius B. Alexander, surviving trustee, and yourself, as special master.

Respectfully yours, C. S. WOOD, *Crier.*

[Endorsed:] Exhibit F to master's report of sale. G. R. Hill, sp. master.

702 (Endorsed:) Master's report of sale. Filed Aug. 23, 1877. Geo. T. Swan, cl'k, by J. M. McKee, D. C.

UNITED STATES OF AMERICA, *Southern District of Mississippi*, } *sc:*

I, Jas. M. McKee, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed thirty-four pages contain a true and complete transcript of the special master's report of sale made to said court in the cause therein stated as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of our said court, at office, in Jackson, in said district, this 26th day of May, in the year of our Lord 1885.

JAS. M. McKEE, *Clerk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *sc:*

I, R. A. Hill, district judge of the United States for the State of Mississippi, hereby certify that James M. McKee, whose genuine signature appears to the above attestations, was at the date
703 thereof and yet is clerk of said court, duly appointed and qualified as such; that his signature thereto is genuine, and that said attestation is in due form and by the proper officer.

Given under my hand and private seal (having no official seal), at Jackson, Miss., this 26th day of May, A. D. 1885, and of our Independence the one hundred and eighth.

R. A. HILL, [SEAL.]
U. S. District Judge for Mississippi.

704 In the Circuit Court of the United States for the Southern District of Mississippi, August Special Term, 1877.

THURSDAY, *August* 23, 1877.

JOHN NEWELL and JUNIUS B. ALEXANDER and ILLINOIS CENTRAL RAILROAD COMPANY
vs.
MISSISSIPPI CENTRAL RAILROAD COMPANY, NEW ORLEANS, ST. LOUIS AND CHICAGO RAILROAD COMPANY, SOUTHERN RAILROAD ASSOCIATION, *et als.*

The master in this cause having made his report of the proceedings for the execution of the decree in the above-entitled cause rendered in the United States circuit court at Jackson, Mississippi, in the original cause, on the 22d day of December, 1876, and in
705 district court of the United States at Oxford, Mississippi, and in the circuit court of the United States at Memphis, Tennessee, and Paducah, Kentucky, in causes ancillary to said original cause, for the foreclosure of the claims of the defendant and the sale of the property described in the decrees aforesaid, and it appearing

from the said report that all of the proceedings under said decrees are regular, and that the property and franchises mentioned in the said decrees were sold on the 23rd day of August, 1877, in Jackson, Mississippi, at the time and place specified in the advertisement, and the said master having reported that William H. Osborn, Lewis E. Simonds, Benjamin F. Ayer, Constantine Menelas, William Alexander Gordon, and John Dunn are the purchasers of said property as a purchasing committee selected by the holders of 2,676 of the bonds proved in this cause out of 3,720 which had been issued and sold of the series described in the deed of trust aforesaid, and a deed having been reported for execution by the master so as to convey the property to the purchasers aforesaid and the master having reported that these purchasers are ready and prepared to pay
706 the balance that may be due to the holders of such bonds as shall not elect to become parties to the purchase—

The court, upon consideration of the premises, orders that the deed reported by the master for execution by the trustees, Newell and Alexander, by the defendants The New Orleans, St. Louis and Chicago Railroad Company and The Southern Railroad Association and the Mississippi Central Railroad Company, and by the special master is approved, and that the master cause the same to be prepared for delivery in conformity with the terms of his report. The court further orders that the master adjust the accounts with the trustees for the costs, expenses, and charges attending the sale, and receive from any holder of bonds their election to become parties to the purchase under the purchasing agreement, and also provide for the payment of the *pro rata* shares of such bondholders as may decline to become parties in the manner specified in the report.

The court further orders that the reports be filed, and unless there be exceptions thereto within the time limited by the
707 rules of the court that the same stand confirmed.

August 23, 1877.

R. A. HILL, *Judge, etc.*

UNITED STATES OF AMERICA,
Southern District of Mississippi, } *sc:*

I, Jas. M. McKee, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed two pages contain a true and complete transcript of the decree of said court confirming the sale made in the cause therein stated as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office, in Jackson, in
[SEAL.] said district, this 31st day of July, in the year of our Lord 1885.

JAS. M. McKEE, *Clerk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *sc:*

I, R. A. Hill, district judge of the United States for said
708 district, hereby certify that Jas. M. McKee, whose genuine signature appears to the above attestation, was at the date thereof and yet is clerk of said court, duly appointed and qualified as such; that his signature thereto is genuine, and that said attestation is in due form and by the proper officer.

Given under my hand and private seal (having no
[SEAL.] official seal), at Jackson, this 1st day of August, A. D. 1885, and of our Independence the one hundred and tenth.

R. A. HILL,
U. S. District Judge for Mississippi.

709 Deposition of Moorfield Storey, taken *de bene esse* before William E. Zabriskie, Esq., notary public, at No. 45 William street, New York city, January 29th, 1886.

Present: Mr. William G. Wilson, for complainants; Messrs. Wayne MacVeagh and F. S. Bangs, for defendant-.

MOORFIELD STOREY, being duly sworn by said notary, testifies as follows:

Direct examination.

By Mr. WILSON:

Q. Will you please state your name, age, residence, and occupation?

A. Morrfield Storey; 40; residence, Brookline, Massachusetts; occupation, lawyer.

Q. Are you engaged in the practice of law in the State of Massachusetts?

A. I am; in Boston.

Q. And for how many years have you been so engaged?

A. Sixteen years and a half.

Q. Practicing in the courts of the State of Massachusetts?

A. Yes, sir.

710 Q. Are you familiar with the practice and the laws of Massachusetts governing the practice?

A. I thim I am; yes, sir.

Q. Did you know C. Brown Snyder, who was formerly of the city of New York and is now deceased?

A. I did.

Q. Did you have any professional dealings with him?

A. I acted as his counsel for a number of years.

Q. Did you also know Henry S. McComb, late of Wilmington, in the State of Delaware, who is now also deceased?

A. I did, so far as meeting him in court is concerned.

Q. Did you personally have any connection with litigation which took place in the lifetime of Mr. Snyder and Mr. McComb between them?

A. I did.

Q. In what capacity?

A. I acted as counsel for Mr. Snyder in a suit which he brought against Col. McComb in the supreme court of Massachusetts.

711 Q. I show you from the record of testimony hitherto taken in this cause, at page 113, the paper marked Defendants' Ex. 1, February 7, 1885, and ask if that record is a record of the suit to which you referred in your last answer.

A. I should say it was a printed copy of the record in that suit.

Q. It purports to be a copy of the record, does it?

A. Yes, sir.

Q. And, if accurately copied, it is such?

A. Yes, sir; it is.

Q. That record purports to show a declaration followed by an answer and demurrer and then an amended declaration?

A. Yes, sir.

Q. Please state what effect under the practice of the Massachusetts courts that amended declaration had upon the original declaration.

A. The allowance of the amendment had the effect of striking out the first four counts in the original declaration and sub-

712 stituting in their place the two counts in the amended declaration.

Q. Did that leave anything of the original declaration in force?

A. The original declaration contained five counts; the amendment struck out the first four and left the fifth count in the original declaration.

Q. For greater clearness, will you please read that count?

A. Yes, sir; the fifth count is as follows: "The plaintiff further says that the defendant has converted to his own use 600 shares of the capital stock of the Southern Railroad Association, a corporation duly established by the laws of the States of Mississippi and Tennessee, the property of the plaintiff."

Q. Was issue taken upon that count which you have last read?

(Mr. MACVEAGH: I object to that question as being improper to ask the witness inasmuch as the record of the case must, in that respect, speak for itself.)

Q. Well, I will modify the question. If the record anywhere shows issue taken upon the count last read by you, please point out and read such part of the record as does raise that issue.

713 (Same objection interposed by Mr. MacVeagh.)

A. The record shows that no issue of fact was taken on the third count of the amended declaration which I have just read. The defendant demurred to the third count in the amended declaration (which was the fifth in the original declaration) and thereby raised an issue of law.

Q. Was the issue raised by that demurrer ever disposed of judicially?

(Same objection.)

A. It never was.

Q. Was any disposition made of it?

(Same objection.)

A. When the case came to be tried plaintiff's counsel were of opinion that the demurrer was well taken, and, by mutual consent, the count was abandoned.

Q. Mutual consent between whom?

A. Between counsel who represented the plaintiff and those who represented the defendant.

Q. Does the record, which has been shown you, show or purport to show any disposition of that issue of law?

(Same objection.)

714 A. I don't see that it does. According to the practice of Massachusetts, where a demurrer is interposed to any count in the declaration that must be disposed of before any trial on any issue of fact presented by the count demurred to can be had, and the entry would appear of either demurrer sustained or demurrer overruled, and if the demurrer was overruled an answer, raising some issue of fact, would be filed by the defendant before any trial on any question of fact arising under that count could be had. If the demurrer was sustained, the plaintiff must either amend so as to cure the objection raised by the demurrer or abandon the count. There is nothing in the record here to show that the demurrer was ever argued, and, as a matter of fact, it was not for the reason that I have stated.

Q. Were any questions of fact tried in that cause?

(Same objection.)

A. There were.

Q. Does the record, which has been shown you, purport to show that fact?

A. It does.

Q. And, if so, in what language?

715 A. The record shows, on page 128, the following entry:

"Thereupon the parties appeared and after a full hearing by our said court, without a jury, the following finding was made in said case, to wit:

"C. BROWN SNYDER
"*v.*
"HENRY S. MCCOMB.

"In the above-entitled cause, heard by the court without a jury, the court finds for the defendant.

"SETH AMES, *J. S. J. C.*"

That part of the record shows that an issue of fact was submitted to the court sitting as a jury, and the finding, as I have just read, is a finding on that issue of fact, corresponding to the verdict of a jury when taking its place where the case is heard on an issue of fact without a jury.

Q. What issues of fact were so tried in the case?

(Same objection.)

716 A. The main issue of fact was the question whether the plaintiff and the defendant had made the contract which is set out in the first count of the amended declaration. The other issue of fact was whether that contract was supported by consideration.

Q. Those are the same issues to which you have already referred in stating what issues were raised under the amended declaration, aren't they?

A. Yes, sir; they are.

Q. The same issues of fact?

A. Yes, sir. I have in my hand the briefs which were filed for the plaintiff and for the defendant at the trial of that action, and in those briefs the issue is stated by the opposing counsel.

Q. The record also purports to show an application to turn the action into a suit in equity, does it not?

A. It does.

Q. Was that application prior or subsequent to the trial of the issues of fact of which you have spoken?

A. It was subsequent to the trial of the issues of fact. In order to make the answer clear and to explain the record I should say this: That the case was heard on the issues of fact, argued,
717 and submitted to the judge; that he announced his decision at a later day, but postponed entering his finding until the application for an amendment to a bill in equity had been made and heard. It was made and heard at a still later day and refused, and then the finding was made and the judgment followed.

Q. Now, to go back to an earlier stage of the proceeding. Who drafted the original and amended declarations in that suit?

A. I did.

Q. At that time or during the pendency of the trial of that action had you any knowledge or notice of any kind of the existence of the three papers which appear on the record of the testimony already taken in the present cause, at pages 52 and 56, as Exhibits 2, 3, and 4?

A. I had not. The existence of those agreements was not discovered by me until after Col. McComb's death, it having been impossible before that time to obtain any information as to the books of the company or the dealings of the Pennsylvania Company.

Q. Had you prior to such discovery, prior to the death of
718 Col. McComb, any knowledge of the transactions in which those three instruments were made?

A. I had not.

Q. Had you had any notice of those transactions in any form?

(Objected to.)

A. I had not.

Q. When did you first obtain any knowledge or information in regard to them?

(Objected to as being irrelevant.)

A. After Col. McComb's death, as a director of the Southern Railroad Association and one of the committee appointed to audit the accounts between Col. McComb's estate and that association, I first obtained access to its books, and, following clues which they showed, learned of the dealings between Col. McComb and the Pennsylvania Company.

Q. When did you become a director in the Southern Railroad Association, before or after the death of Mr. McComb?

A. After the death of Mr. McComb.

Cross-examination.

By Mr. McVEAGH:

719 Q. What was the first step taken by the defendant after the filing of the original declaration?

A. I think the first step was to file an answer, which included a demurrer to every count in the declaration except the then fifth count.

Q. That is, the demurrer did not go to the fifth count?

A. The demurrer did not go to the fifth count.

Q. But the answer did?

A. Yes, sir; there was a general denial in that answer to each and every count in the declaration.

Q. So that there was a distinct issue of fact then formed as to the allegation of fact in the fifth count?

A. There was.

Q. The first count of the amended declaration alleges that the defendant had in his hands or possession, in the month of July, 1869, the sum of $45,000 belonging to the plaintiff, does it not?

A. That is the allegation.

Q. That allegation the defendant distinctly denied in his answer?

A. His answer contains a denial of each and every allegation.

720 Q. And therefore it denied that allegation?

A. Yes, sir.

Q. The allegation in the second count was that the defendant was indebted to the plaintiff in the sum of $45,000 for money had and received by the defendant to the plaintiff's use?

A. Yes, sir.

Q. And that he denied?

A. That he also denied; yes, sir.

Q. As I understood you, you stated that the demurrer to the third count was supposed to be good in law?

A. That was the conclusion which the plaintiff's counsel reached.

Q. And therefore it was treated as if that demurrer had been sustained?

A. Yes, sir—that is to say, the count was abandoned and no trial was had upon it.

Q. That is to say, is it not, that that demurrer was assumed to be good to it?

A. We did not press the count.

721 Q. There had been, previous to the filing of that demurrer, a distinct denial of its facts spread upon the record?

A. Yes, sir; it was withdrawn when the amended answer was filed.

Q. What evidence is there that it was so withdrawn on this record?

A. The defendant's answer to the amended declaration, which states in terms that he denies the first two counts and then proceeds to demur to the third count and not to answer it, it being a perfectly well-established rule of proceeding that after an issue of fact is joined on account a demurrer in point of law could not be interposed; a demurrer can only be interposed on the theory that issue was not joined, and then the count was withdrawn.

Q. Turning to pages 120 and 121 of the answer of the defendant to the first declaration, is it not true that the defendant both answers and demurs to the same counts—demurs after he answers?

A. The demurrer may appear——

Q. Is that true or not?

A. "And for further answer the defendant demurs to each and every count"—except the last one. Yes; that does appear.

722 Q. So that he answered the first four and had also demurred to them?

A. It so appears by the record.

Q. And had not demurred to the fifth at that time?

A. Had not demurred to the fifth at that time.

Q. And when the amended declaration was filed he answered to the first two and demurred to the third?

A. He did.

By Mr. WILSON:

Q. Under your practice, where a declaration is amended and the amended declaration is answered or demurred to, what effect does that have on the prior pleadings?

A. The new pleadings take the place of the old.

Q. Do any part of the old then remain in force?

A. Under our practice it is open to a plaintiff to make an amendment to his declaration, which, when allowed, gives the defendant the right to amend his answer; that is a right which he may or may not avail himself of at his option. If he does avail himself of it and files a new answer, the amended declaration and the new answer become the pleadings in the case.

Q. Superseding the old?

A. Superseding the old.

723 By Mr. MACVEAGH:

Q. If he does not avail himself the former answer remains?

A. If he does not avail himself of it the former answer is the only answer in the case.

Q. And is considered as an answer to the amended declaration?

A. Yes, sir.

(Signing waived.)

NEW YORK, *February* 13, 1886.

The parties met pursuant to adjournment.

Mr. Wilson, for complainant, reads in evidence from printed brief of closing argument for defendant in suit of C. Brown Snyder *vs.* Henry S. McComb, in the supreme judicial court of Massachusetts, as follows:

"There is added a count in tort for conversion of 600 shares South. R. R. Association.

"This was the original claim, filed April 4, 1876, as of October, 1875.

"It was answered by defendant May 3, 1876, by a general denial, and so the pleadings stood until June, 1876, when
724 plaintiff abandons all these counts and claims instead," &c. (Page 2.)

"The count in tort has been abondoned." (Page 3.)

"I. Did such consideration ever exist?

"II. Was such an agreement ever made by defendant?

"The defendant denies both, and if the agreement alleged was not made the plaintiff cannot recover, whether other or different agreements, if any, may have been made.

"Other and different agreements not only will not aid or establish this, but may be shown under a general denial to repeal it." (Page 3.)

"It is important to keep in view precisely what this alleged agreement is on which the plaintiff seeks to recover.

"This suit is not a bill in equity to enforce a trust declared orally or in writing.

"It is not an action at law even if such an action would lie upon any 'trust receipt.'

"It is an action upon an alleged distinct and specific contract." (Page 17.)

"From this unbroken line of uncontroverted evidence it is
725 perfectly apparent that no such agreement as the plaintiff alleges ever was made between him and the defendant or was ever supposed by anybody to have been made.

"No letter, no paper, no person has ever pretended to assert or claim it.

"If the court is not satisfied that the agreement alleged in the declaration was made there is an end of this case.

"Still more if the court is satisfied negatively that such an agreement under the facts appearing never was or could have been made." (Page 45.)

"It is, of course, unnecessary to give any consideration to the 'trust receipt' except as it disproves the agreement alleged, because—

"(1.) It is not the contract alleged and declared on and for breach of which money is sought.

"(2.) Because its only scope and effect is to create a trust, for the enforcement of which no action of law can be brought, but only a remedy sought in equity." (Page 50.)

"So long as no other relation exists between the parties but that of trustee and *cestui que trust.* no action can be maintained
726 by the latter against the former for any money in his hands. The trustee is the only person entitled at law to the money, and the remedy of the *cestui que trust.* is exclusively in a court of equity. The *cestui que trust.* has no legal remedy." (Page 50.)

"No action at law will lie to enforce *of* for breach of a trust." (Page 51.)

"A trustee is accountable to *cestui que trust.* in equity alone. In courts of law he is treated for most purposes as the absolute owner, and no action can, in general, be maintained by *cestui que trust.* against him to recover trust money." (Page 51.)

"Wherever stock is taken in name of person as trustee, whether actual trust exists or not, court will regard it a trust and enforce it as such." (Page 51.)

"It becomes wholly unnecessary, as it is entirely impracticable, to enquire, consider, or determine what anybody's rights may be under the trust created or declared on in this transaction.

"When, if ever, a bill in equity shall be brought, and all parties in interest brought into court, that may be an interesting as it will be a necessary question. Till then it is enough that the
727 & 728 trust created and acted upon for more than six years by all parties clearly negatives any other agreement concerning this original subscription, and necessitates a judgment for the defendant in this suit.

"CHAS. THEO. RUSSELL,

"*With F. N. Bangs, Counsel for Defendant.*" (Page 51 P.)

729 And afterwards, to wit, at this same term, to wit, October term, A. D. 1887, and on the 12th day of June, A. D. 1888—present, the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States of America, assigned to this circuit, and the Honorable Leonard E. Wales, district judge—the following proceedings were had, to wit:

Final Hearing.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of the Goods, Chattels, and Credits of C. Brown Snyder, Late of the City of New York, in the State of New York, Deceased,
vs.
ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, Late of the City of Wilmington, in the State of Delaware, Deceased.
} No. 96. In Equity.

730 This day came the parties, by their counsel, and the issues herein came on to be heard, and the hearing not being concluded the same was adjourned until to-morrow morning.

JUNE 13TH, 1888.

This day came the parties, by their counsel, and the hearing of the issues herein was resumed, and the same was concluded.

And afterwards, to wit, at a stated term of said court, begun and held in the city of Wilmington on the third Tuesday (being the eighteenth day), June, A. D. 1889, and on the third day of July, A. D. 1889—present, the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, assigned to this circuit, and the Honorable Leonard E. Wales, district judge—the following proceedings were had:

731 Opinion of Judge Wales delive-d and filed as follows:

732 Circuit Court of the United States for the District of Delaware.

SNYDER'S ADMINISTRATORS
vs.
MCCOMB'S EXECUTRIX.
} In Equity.

The bill states, in substance, that Henry S. McComb in his lifetime held eight hundred shares of the value of $1,000.00 each in the Southern Railroad Association as trustee for C. Brown Snyder, and that he failed to account for them, having converted them to his own use, and this suit is now brought to obtain a decree establishing the trust and for the payment by the defendant of the value of the stock, with its dividends, accreations, etc., including an order for an accounting. The history of the creation of the alleged trust is a very brief one. On the 30th of June, 1868, an unincorporated company called the Southern Railroad Association was formed by McComb and others, with a capital of $1,500,000. Among the subscribers to this capital were Henry S. McComb for $415,000.00, Josiah Bardwell for $100,000.00,
733 and Henry S. McComb, trustee, for $60,000. The capital was soon afterward increased to $2,000,000.00, and on Jan-

uary 14th, 1869, the company was incorporated under its original name by an act of the legislature of Tennessee and was organized under its charter on the 21st of the same month, with McComb as president. The following correspondence between Bardwell and McComb relates directly to and contains the first acknowledgement of the trust in favor of Snyder:

"MY DEAR MCCOMB: Will you please acknowledge that you hold in "the Southern Ass'n," as trustee for (the benefit) or rather for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest.

Yours truly, J. BARDWELL.

Boston, Nov. 12, 1869."

"OFFICE OF H. S. MCCOMB,
WILMINGTON, DEL., *Nov.* 22, 1869.

Josiah Bardwell, Esq., care of F. Skinner & Co., Boston.

DEAR SIR: I send this (acknowledgement as trustee) the
734 first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes in any manner please return it to me, with such instructions to be carried out as you shall be disposed to make.

Yours truly, H. S. McCOMB, M."

The following is a copy of the paper enclosed in McComb's letter:

"To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself.

H. S. McCOMB, *Trustee.*"

On this acknowledgement is a memorandum in Bardwell's handwriting: "Received Nov. 23, 1869."

735 It is not denied that this acknowledgement by McComb at the time it was made created a trust of some sort in favor of Snyder, but it is claimed on behalf of the defendant that the right of Snyder to a beneficial interest in the trust stock was subject to prior liens or incumbrances for advances made by McComb to Bardwell which were far in excess of the value of the stock, both at and subsequent to the date of the acknowledgement; in other words, that Snyder's interest in the stock was a contingent one, depending on the payment of certain claims held by McComb against Bardwell, who was the original *cestui que trust.*, and that these claims have never been paid. An issue of fact is thus presented which can be determined only by a review of the evidence, but before

entering upon any discussion of disputed facts a preliminary statement of uncontroverted matters in the cause will materially shorten such discussion and render it more intelligible.

There is no evidence that McComb ever repudiated or disclaimed this declaration of trust. He did, however, when threatened with a suit, assert that Snyder's interest was only a qualified one, as before stated. The assessments on the subscription for the trust stock, as far as there is any evidence on that subject, were paid by
736 Bardwell, and certificates Nos. 157 to 164, inclusive, for eight hundred shares (increased from the original 600 by the increase of the capital of the association) were issued to Henry S. McComb, trustee, October 6, 1870, and these shares stood in his name as trustee at the time of his death, December 30, 1881. On November 8, 1871, McComb sold and transferred 5,000 shares of the Southern Railroad Association belonging to himself to the Pennsylvania Company at $125.00 per share and on the same day transferred to the same company 5,000 other shares of the stock, including those standing in his name as trustee. Upon the face of the transaction the transfer of the second 5,000 shares was made without any money consideration and solely for the purpose of giving to the Pennsylvania Company the controlling management of the association, but by the terms of his agreements with that company McComb parted with and surrendered the possession of the trustee stock for the time being. It was out of his possession at the time of his death and was delivered to his executrix by the Pennsylvania Company at about the time of the beginning of this suit. It does not appear that any dividends were declared on the trust stock, or that McComb
737 derived any profit from its transfer to the company except that such transfer may have directly or indirectly enhanced the price which he received for his own stock. The Southern Railroad Association was afterwards merged by consolidation in another company, ceased to have an independent existence after July 1, 1874, and thenceforward its stock had a nominal value only. The consolidated lines went into the hands of a receiver and were sold by virtue of foreclosure proceedings on a mortgage. The original object of the association was to obtain by lease or purchase certain main lines of railroad between Chicago and New Orleans, and thus control a large, if not the principal, share of the business of transporting passengers and freight between those important cities, as well as between intermediate points. The scheme appeared to be feasible and attractive to the enterprising minds which conceived it and to the men who united in its execution, but it failed by reason of causes not necessary here and now to relate.

Approaching the more debatable portion of the testimony, the first inquiry relates to the understanding or "arrangement" which was had among themselves by McComb, Bardwell, and Snyder in reference to the trust stock. McComb and Bardwell,
738 acting independently and sometimes jointly, were large operators in railroad stocks and other securities, and their personal relations, judging from the letters that passed between them, were intimate and cordial. In the early part of 1869 they were concerned

in a joint speculation in the stock of the Chicago and Rock Island Railroad Company, to which Bardwell contributed $45,000.00 and was to receive one-fourth of the profits after all the expenses had been deducted, as appears from the following receipt executed by McComb:

"AP'L 22, 1869.

Received, Boston, April 22, 1869, of J. Bardwell his three drafts of $15,000 each, 30, 40, and 50 days' date, on Strang and Snyder, New York, being a payment of one-fourth interest in 10,000-share transaction in the stock of the Chicago and Rock Island Railroad Co., to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co., of New York, as brokers, for the account of myself and Bardwell.

H. S. McCOMB."

Annexed to this paper is the following memorandum:

"The three drafts mentioned in the foregoing receipt were
739 paid by Strang and Snyder and by them charged to my account on their books after the transaction in the Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but $42,000.00 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt as trustee, dated Nov. 23, 1869.

C. B. SNYDER.

Boston, January 23, 1870."

Assessments on the subscription to the trust stock were paid by Bardwell prior to McComb's acknowledgement as follows:

July 8, '68, 40% on $60,000, or	$24,000
Jan. 10, '69, 10% " " "	6,000
(Stock increased 33%, or to $80,000.)	
Jan. 2, '69, 5% on $80,000, or	4,000
M'ch 2, '69, 5% " " "	4,000
Sep. 20, '69, 5% " " "	4,000

This statement shows that up to November, 1869, $42,000 had been paid on the trust stock and corresponds with the acknowledgement of trust made by McComb.

740 In reply to a letter dated October 25, 1873, written by E. F. Cutter to McComb, enquiring, "Are the interests of F. S. & C. in the Southern R. R'd Association, on which you advanced 60 M, still intact, and are they worth the loan and principal? How does the 60 M of Mr. Snyder stand affected?"—

McComb wrote two days later: "The South'n R. R. Association stands all right and everybody's interest stands upright and square." Later on, on June 3, 1874, Snyder applied to McComb for $30,000 either by way of payment on account for the trust stock or as a loan, with the suggestion that McComb could reimburse himself from the

sale of consolidated bonds. Bardwell urged McComb to comply with Snyder's request, but McComb declined. It is evident from the letters which passed between McComb and Bardwell and Snyder at the time of this application that both Bardwell and Snyder understood and believed that Snyder's interest in the trust stock was represented by $42,000 and that Snyder was entitled to at least that much of its value, without making any allowance for the claims of other parties.

741 Being further pressed for money by Snyder, McComb wrote to him on July 21, 1874, that he (McComb) held the trust stock as collateral for advances made to Bardwell and F. Skinner & Co., "which advances more than cover all this stock." In the same letter, however, McComb offered to send Snyder $30,000 Southern R. R. Association paper on condition that Snyder would surrender to him the written acknowledgement of the trust. Snyder replied to this that "F. Skinner & Co. never had any interest in the money you receipted to me for as trustee, neither had Mr. Bardwell, except that I agreed to share the profits of the transaction with him after receiving the principal and interest at 8 per cent. per annum, and it was as much to help him as myself that I asked you for an advance. I cannot entertain your offer for a moment, but I will assign my interest to parties who will take what they are entitled to—no more, no less."

The statement of Snyder's account with F. Skinner & Co. is produced in confirmation of what Snyder had written to McComb:

"BOSTON, *Novem.* 20, 1874.

C. B. Snyder, Esq.

742 DEAR SIR: On the 4th of August, 1869, we received the sum of $44,709.38 and paid as follows:

June 29, 1869	$37,580 00
Octo. 1, "	2,305 44
Aug. 25, 1870	4,100 00
	$43,985 44

And Mr. Bardwell's note, due Sept. 2d, 1870, for $4,172.58, lays under protest, as far as we know.

The above receipt and payments being on account of your subscription to the Southern R. R'd Association.

Yours truly, EDM'D F. CUTTER,
Of F. Skinner & Co."

Towards the close of the year 1869 Bardwell became financially embarrassed, although as late as September 15, 1869, McComb had written to him—

"The net of your account is	$36,719 80
From which deduct payment of	2,500 00
Leaving due you and subject to call	34,219 80

Shall I pay your trustee call S. R. R. A., due the 20th inst.?"

On November 18, 1869, Bardwell executed a power of attorney to transfer his own stock—1,333 shares—in the association.

743 The witnesses Cross and Marsh testify to conversations had at different times in the years 1873 and 1874 between McComb and Snyder in which McComb represented the stock of the association to be of great value and advised Snyder not to part with his interest. Henry Mulliken, another witness for the complainants, acquired an interest in the association in 1868 for $10,000 which eventually represented 174 shares of stock, for which McComb, in the spring of 1873, offered him $25,000 and in the autumn of the same year $17,000, both of which offers were declined.

The testimony for the complainants, of which a general outline has now been given, points to the conclusion that the acknowledgements of November, 1869, created an unqualified trust in favor of Snyder for at least the quantity of stock represented by $42,000, nor is there any evidence to the contrary, excepting the unsupported statements of McComb, which were founded on a misapprehension by him of his arrangement with Bardwell and Snyder.

A court of equity would hesitate to enforce a declaration of trust, absolute on its face, if it was intended by the declarant, with the knowledge and consent of the *cestui que trust.*, that the interest of the beneficiary was a qualified one and subject to well-understood contingencies, but here there does not appear to be a reasonable

744 doubt that Bardwell and Snyder believed that Snyder was to be the beneficiary of the trust stock for the amount of money which he had paid Bardwell for it, without qualification, and the expressions used by McComb in declaring the trust import the same thing. Colonel McComb was a man of superior intelligence and capacity, possessed of a large experience acquired in the management of extensive business operations of different kinds, and was fully competent to protect his own interests on all occasions; and if he failed in this instance, in making this declaration of trust, to guard against the loss of a collateral security, while he may have deceived himself, his fault or mistake cannot be allowed to deprive an innocent person of his rights. Bardwell requested him to "acknowledge that you hold in the Southern Ass'n, as trustee for (the benefit) or, rather, for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since p'd me its costs and interest." McComb, in sending the required acknowledgement, wrote to Bardwell that "if it is not in conformity with your wishes in any manner please return it to me with such instructions to be carried out as you shall see- disposed to make." It will be

745 observed that Bardwell made no allusion to any previous bargain or arrangement, but asked for a simple acknowledgement, which McComb made in his own way, but proposed to put it in any other form that Bardwell might direct. The death of Bardwell in October, 1875, has deprived both parties to the present suit of his evidence on this matter, except what may be gleaned from his letters to McComb, and what he thought of the nature of Snyder's interest in the trust stock may be seen from one of those letters, dated June 24, 1874, in which he wrote:

"DEAR GENERAL MCCOMB: I make transcript of memorandum for Snyder's benefit, undertaking to carry out myself the verbal agreement I made with you—6 notes for $5,000 each, Southern Railroad Association, 4 mos., and 2 for $5,000 each, your endorsement, you to have the $42,000 Snyder's as col. security, and I will send you the satisfactory papers. I think you will send them to my care for Snyder. * * *

Truly yours, J. B."

This does not look as if Bardwell believed that Snyder's
746 interest was subject to any lien or incumbrance, or he would hardly have proposed to McComb to accept the trust stock as collateral security for further advances.

The reading of the whole correspondence prompts several questions. Why should a capable and experienced man like Colonel McComb have made a declaration of trust for the benefit of Snyder in property which was already held by McComb as collateral security for more than it was worth? Did McComb and Bardwell contrive to deceive Snyder by luring him into the belief that the money which he had lent to Bardwell was safely secured by its investment in the trust stock, or did McComb endeavor to allay all suspicion on the part of Bardwell and Snyder by writing to Bardwell that if the form of acknowledgement was not entirely satisfactory he would reform it in any manner to please Bardwell? To answer these questions consistently with the theory of the defense that Snyder's interest was only a contingent one, would, in the light of all the testimony, reflect unfavorably on the intelligence or on the good faith of McComb. All that can be said is that he probably misunderstood the arrangement which led up to the creation of the second trust, and that he failed, in writing the acknowledgement of it, to limit his liability as trustee in the way now contended
747 for. There is no impenetrable mystery about this trust. The only trouble is that all the persons who were closely connected with and interested in the business are not here to explain some of the minor details; but, looking at the facts contained in the evidence and spread on the record of the case, there is sufficient proof to establish the trust as set forth in the bill of complaint.

Having disposed of this branch of the defense, there remain to be considered the plea of the statute of limitations and the defense of *res adjudicata*.

It may be sufficient to say that, as between a trustee and his *cestui que trust*, an express trust, created by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being the possession of the *cestui que trust*. This is elementary law, not without modifications, it is true, but none of which are applicable to the present case. Hill on Trustees, 264, and the cases there cited; Prevost *vs.* Gratz, 6 Wheat., 497; Deconche *vs.* Savetier, 3 Johns. Ch'y, 216; Goodrich *vs.* Pendleton, 3 Johns. Ch'y, 390.

As already seen, there never was any disclaimer of the trust by

McComb. He admitted it with a qualification, and no stat-
748 ute has been referred to by which a trust, when once created, is barred by lapse of time. In fact, this defense was not insisted on in the argument.

But it was urged with much ingenuity and with an imposing array of authorities that the matters now in dispute between the respective representatives of McComb and Snyder have already been passed upon by a court of competent jurisdiction and are, therefore, *res adjudicata* and are not now subject to be reviewed and decided anew by this court. To sustain this defense evidence has been introduced of two separate actions instituted by Snyder against McComb to recover the money which Snyder advanced to Bardwell and which went into the trust stock in the hands of McComb. The first action was brought in the supreme court of the State of New York June 25, 1875, and was discontinued January 19, 1876. The second action was begun October 26, 1875, in the supreme judicial court of Massachusetts, was heard by that court without a jury, and resulted in a judgment in favor of the defendant December 23, 1878. The amended declaration in the Massachusetts action set forth that in July, 1869, the defendant, having in his hands the sum of
749 $45,000 belonging to the plaintiff, promised the plaintiff, for the consideration of leaving this money in defendant's hands, that he would purchase therewith a number of shares in the capital stock of the Southern Railroad Association and would cause certificates for said shares to be issued to the plaintiff and to be delivered to him and, further, that he would at any time, when requested, take the said shares from the plaintiff and pay him the sum of $45,000, with interest at the rate of seven per cent. The declaration further complains that, relying on the defendant's promises, the plaintiff allowed the defendant to retain the sum of $42,000, but that the defendant neglected to purchase the stock or to perform his promises, &c. The issues of fact tried in that case were whether the plaintiff and defendant therein made the contract declared on and whether there was any consideration for such a contract. The defendant's counsel negatived both these propositions and relied on the acknowledgement of trust to disprove the contract, contending that an action at law would not lie on such a paper, because the only scope and effect of such acknowledgement was to create a trust for the enforcement of which a remedy must be had in equity.

Before judgment was rendered a motion was made
750 on behalf of the plaintiff to convert the declaration into a bill in equity under the provisions of a Massachusetts statute which authorized the supreme judicial court of that State to change a suit at law into a proceeding in equity at the discretion of the court if such change be necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought. The court denied the motion presumably on the ground that the action at law had no relation to the establishment of a trust, but, whether such was the reason or not, the court exercised its discretion in refusing the motion without prejudice to the right

of the plaintiff or to his representatives to bring an independent suit in equity to enforce the trust and compel its proper execution. The opinion of the court makes no part of the record of the judgment, and it nowhere appears that the question involved in the present suit was considered or decided by that court. Much testimony was given on the trial by McComb and Snyder, but their testimony was in relation to the existence of the contract between them as declared on, and not for or against the establishment of a trust, which is the issue made by the bill and answer in the cause now before this court. Moreover, at the time of the trial in
751 Massachusetts Snyder was ignorant of important facts which are vital to the support of the present suit and which were not discovered until after his death, particularly of the transfer of the trust stock to the Pennsylvania Company in 1871 and of the profitable sale of McComb's own shares at the same time, nor had he knowledge of the value of these shares, which were not quoted in the stock exchange or placed on the market for sale.

Res adjudicata cannot be pleaded as a technical estoppel or be introduced in evidence as conclusive, *per se*, except where there is both identity of parties and identity of cause of action. The rule laid down in the Duchess of Kingstone's case, 2 Smith's L'd'g Cases, part 2d, 8th ed., 785, is the accepted law on this subject: "That the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court." The same parties who were litigants in the Massachusetts case are represented here by their privies in law, but here the cause of action and the thing sued for are different. In the former case the cause of action was an alleged contract; here the object of the suit is to establish a trust. The acknowledge-
752 ment of the trust, which is the basis of the present suit, was sued to defeat the action on the contract. It thus becomes perfectly clear that the former judgment cannot under these circumstances be pleaded or used to bar or estopp the complainants. The applicability of *res adjudicacata* as a plea or bar is well explained in Crownwell *vs.* The County of Sac, 94 U. S., 351, where the court say: "In all cases, therefore, where it is sought to apply thr estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action."

In determining the amount for which a decree should be entered it must be remembered that Snyder during his lifetime never claimed more than the sum of $42,000, that also being the amount which McComb acknowledged to have been paid on the trust stock at the time he made the acknowledgement, and there is no proof that Snyder paid any assessments after that. It has been shown that the stock never had an ascertained market value or that the
753 holders of it received any dividends or interest. The sale by

McComb to the Pennsylvania Company was made on certain conditions, among which was one that he would at the expiration of two years from the day of sale, if requested, take the stock back at an advanced price, and his statements of its value in the presence of Snyder and others were made rather to inflate the stock by giving it a fictitious price than to name a figure at which he would be willing to purchase. He, however, had the use of the money which belonged to Snyder by the assignment of Bardwell. It went into his estate and has not been accounted for, he having always refused or evaded an accounting, and it is only equitable that it should be restored with interest. A decree will be entered in favor of the complainants for $42,000, with interest at six per cent. from the twenty-third day of November, 1869.

L. E. WALES, *J.*

July 3rd, 1889.

754 Opinion of Justice Bradley delivered and filed as follows:

755 United States Circuit Court, District of Delaware.

ADMINISTRATORS OF SNYDER
vs.
EXECUTRIX OF MCCOMB.

BRADLEY, *J.*:

I concur entirely with Judge Wales in the opinion just delivered. There is no question but that McComb held the stock in trust for Snyder. The declaration of trust executed on the twenty-second of November, 1869, is conclusive on this subject; and it is absolute, having no qualification whatever. The words are: "I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself." Whatever may have been the conditions and qualifications of the trust existing whilst Bardwell had
756 the beneficial interest, none are claimed in this declaration as between McComb and Snyder. The plea that it was to be held by McComb as collateral is an afterthought. No such idea was put forward until several years after the declaration of trust was executed. In all the conferences that took place between McComb and Snyder about the stock down to July, 1874, the former never suggested that he held it as collateral or that he had any claim on it. Collateral to what? The pretense now is that it was to be collateral to the debts that Bardwell, the original *cestui que trust.*, owed to McComb. Then why was not that condition expressed in the declaration of trust given to Snyder? No reservation of any such right was made or hinted at. Besides, what debts of Bardwell was it to be collateral for? All the debts that he might ever owe to

McComb, or only those which were due when the stock was subscribed for? The vagueness of the claim as stated by McComb himself in his testimony is strongly presumptive against it. What evidence is there that Bardwell owed a dollar to McComb at the time of the latter's death? It seems to me that this claim to hold the stock as a collateral paramount to the interest of Snyder as *cestui que trust.* is unsupported by any sufficient proof.

757 Assuming that the trust was an absolute one, it is clear that the stock has never been accounted for to Snyder or to his estate. The transaction in Chicago and Rock Island stock in the spring and summer of 1869 does not affect the case in the least except as being the occasion, perhaps, on which Snyder advanced the money to Bardwell, in consideration of which the latter transferred all his interest in the trust stock to Snyder. Besides, this transaction had all passed before the declaration of trust was executed.

The relation, then, of trustee, pure and simple, being established against McComb, how can his conduct be excused? In November, 1871, he sold his own stock in the Southern Railroad Association to the Pennsylvania Company for one hundred and twenty-five dollars per share under agreement, it is true, to repurchase it at an advance at the end of two years at the option of the Pennsylvania Company—an option which we do not learn was ever exacted of him. Whilst thus advantageouly disposing of his own stock he did nothing of the kind with that which he held in trust for Snyder and gave Snyder no notice or information of what he had done with his own, but urged him and pursuaded him against his wishes to

758 let the stock held in trust remain as it was, alleging that it was very valuable, was worth twice its par value, and was a first-rate investment. Nor did he inform Snyder that in his deal with the Pennsylvania Company he had actually handed over the trust stock to that company to enable them to have full control of the operations in prospect.

In June, 1874, Snyder was hardly pushed for money and desired to dispose of the trust stock and applied to McComb for that purpose. The latter urged him to keep it and to put more money into the concern; said that it was a good thing, worth two for one, and all that, never mentioning the fact that the stock was then out of his hands and in possession of the Pennsylvania Company. This was in June, and yet on the first of July of the same year the Southern Railroad Association was merged into another company, which assumed its obligations, it is true, but left its stock out in the cold. McComb himself testified that since that date the stock had had only a nominal value. From the large share of control which McComb has in the affairs of the company it cannot be conceived possible that he was not fully aware of the changes to be made at the very time when he was pursuading Snyder to hold onto his stock.

It seems to me that there was not a faithful execution of

759 the trust on the part of McComb. He was in a situation to know everything that affected the value of the stock. He was one of the managers and manipulators, if not the principal

manager, of the affairs of the association. He was on the inside, and, having such knowledge as this position gave him, he was bound to exercise entire frankness and good faith towards his *cestui que trust*. Instead of doing this, he kept up false appearances, gave glowing views of the value of the stock, discouraged every attempt to dispose of it or to change it for something else, kept secret the disposition of his own stock, and induced Snyder to believe that the prospects of the association were of the most promising character. However free from liability he may have been towards other stockholders, I think the course he pursued was unjustifiable, to say the least, in relation to Snyder, for whom he was trustee.

I concur with Judge Wales in the opinion that the estate of McComb is liable to the complainants for the want of a full and faithful fulfillment of the trust on the part of Mr. McComb. I also agree that in the absence of satisfactory proof of the value which the stock had during the period from 1870 to 1874, when it could have been advantageously disposed of and when Snyder desired
760 to dispose of it, but was prevented from so doing by the representations of McComb, the amount paid upon it, with interest, is the most equitable and satisfactory award of compensation that can be made. It would be no relief at all to the complainants to give them a decree for the specific stock; that has long ceased to have any value. The complainants contend that they ought to be allowed the same price which McComb realized for his own stock in disposing of it to the Pennsylvania Company, to wit, one hundred and twenty-five dollars per share. But that price is not a fair criterion of its value at that time. The sale was incumbered with an agreement to take the stock back at an advanced price at the end of two years if the Pennsylvania Company should so desire. Sales of this kind in which the purchaser incurs no hazard are often effected at fancy prices, and stock is subscribed which the party would never think of taking on his own responsibility and hazard. Besides, another agreement, made at the same time, shows that the transaction was not so much a sale as the joinder of stock, by McComb and the Pennsylvania Company for purposes of mutual profit. I also agree that the offers made by McComb from time to time for portions of the stock are but slight proof of its value.
761 He never purchased at those offers, and in one case, where the party a few days afterwards concluded to accept his offer, McComb replied that it was not an open one, and declined to take the stock. I think, with Judge Wales, that those offers were made to satisfy the holders of the stock that it was their interest to keep it.

The plea of the statute of limitations set up by the defendant does not lie in this case. It is a case of pure trust, subsisting to this hour and not denied. Had the trust been repudiated the statute might have run from the time of such repudiation, but it has never been repudiated. The relief sought by the *cestui que trust*. is not a legal demand, but a purely equitable one, namely, recompence for a deterioration or unlawful disposition of the trust estate by the fault

of the trustee and an account of the proceeds or value thereof. The statute of limitations is no defense in such a case. Great lapse of time and unreasonable delay might be, but the present suit is not amenable to that charge. Sufficient reason is shown for any delay that has occurred. The secrecy observed by McComb in his transactions with the Pennsylvania Company and the ignorance in which Snyder and his representatives were kept are a sufficient answer to the charge of latches and unreasonable delay. The plea of
762 *res adjudicata* is equally untenable. Snyder sued McComb in an action at law upon an alleged agreement to take the stock off his hands at any time. That was the only issue tried. It was decided against Snyder. The mere statement is sufficient to show that the question in that case was very different from the question in the present case. The decision simply settled the point that McComb did not make any such agreement. It did not affect the trust on which this suit is based nor the breach of trust which forms its gravamen.

Let a decree be made for the complainants against the defendant for the sum of $42,000, with interest, at six per cent. per annum, from the twenty-second day of November, 1869, the date of the declaration of trust.

763 *Final Decree.*

In the U. S. Circuit Court, District of Delaware.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, Deceased,
vs.
ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, Deceased.
No. 96. In Equity.

And now, to wit, this third day of July, A. D. 1889, this cause having come on to be heard at the October term, A. D. 1887, and having been argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, to wit: That the said defendant, Elizabeth B. McComb, executrix of the last will and testament of Henry S. McComb, deceased, pay to the said complainants, George A. Frink and Esther S. Snyder, administrator and administratrix of C. Brown Snyder, deceased, the sum of forty-two thousand dollars, with interest thereon at the rate of six
764 per centum per annum from the twenty-third day of November, A. D. eighteen hundred and sixty-nine.

And, further, that the said defendant pay the costs of this suit within sixty days or that an attachment issue.

L. E. WALES, *J.*

Defendant's Prayer for Appeal.

JULY 3RD, 1889.

This day came the defendant, by her solicitor, Austin Harrington, Esq., and prayed an appeal from the final decree of the court in

this cause; whereupon it is ordered by the court that the same be granted and that an appeal bond be executed by the defendant, with sureties to be approved by the court, in the sum of —, within sixty days.

JULY 5TH, 1889.

765 This day came the complainants, by their solicitor, George Gray, Esq., and prayed an appeal from the final decree of the court in this cause; whereupon it is ordered by the court that the same be granted.

Reformation of Final Decree.

In United States Circuit Court for the District of Delaware. In Equity.

AUGUST 7TH, 1889.

GEORGE A. FRINK, Administrator, and ESTHER S. SNYDER, Administratrix, of C. Brown Snyder, Deceased,
vs.
ELIZABETH B. MCCOMB, Sole Executrix, &c., &c., of Henry S. McComb, Deceased.

And now, to wit, this seventh day of August, A. D. 1889, upon motion of George Gray, Esq., solicitor for the complainant—Austin Harrington, Esq., solicitor for the respondent, being present and consenting thereto—it is ordered, adjudged, and decreed that the decree made in the above-stated case on the third day of July,
766 A. D. 1889, be reformed and amended by inserting after the words "eighteen hundred and sixty-nine" the words "to the third day of July, A. D. eighteen hundred and eighty-nine," amounting to the further sum of forty-nine thousand four hundred and twenty dollars ($49,420), making in the aggregate ninety-one thousand four hundred and twenty dollars ($91,420).

LEONARD E. WALES, *J.*

Appeal Bond.

AUGUST 24TH, 1889.

This day came the defendant, by her solicitor, Austin Harrington, Esq., and filed her appeal bond from the final decree of the court in said cause as follows:

Supreme Court of the United States.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, Deceased,
vs.
ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, Deceased.
} In Equity.

767 Know all men by these presents that we, Elizabeth B. McComb, executrix of the last will and testament of Henry

S. McComb, deceased; George W. Bush, Francis N. Buck, Henry C. Robinson, and Elizabeth B. McComb, all of the city of Wilmington, county of New Castle and State of Delaware, are held and firmly bound unto George A. Frink and Esther S. Snyder, administrator and administratrix of C. Brown Snyder, deceased, the complainants above named, in the sum of one hundred and eight-four thousand dollars, lawful money of the United States of America, to be paid to the said George A. Frink and Esther S. Snyder, administrator and administratrix as aforesaid, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the first day of August, anno Domini one thousand eight hundred and eighty-nine.

Whereas the above-named Elizabeth B. McComb, executrix as aforesaid, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Delaware:

768 Now, therefore, the condition of this obligation is such that if the above-named Elizabeth B. McComb, executrix as aforesaid, shall prosecute her said appeal to effect and answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(S'g'd) ELIZABETH B. McCOMB, *Executrix.* [SEAL.]
GEO. W. BUSH. [SEAL.]
FRANCIS N. BUCK. [SEAL.]
HENRY C. ROBINSON. [SEAL.]
ELIZABETH B. McCOMB. [SEAL.]

Sealed and delivered in the presence of—

J. L. OCHELTREE,
As to Elizabeth B. McComb, ex., and Elizabeth B. McComb.

WM. A. SMITH,
As to Messrs. Bush, Buck, and Robinson.

STATE OF DELAWARE, *County of New Castle,* } *ss:*

On this twenty-fourth day of August, A. D. eighteen hundred and eighty-nine, personally appeared before the undersigned George W. Bush, one of the sureties on the foregoing bond, who, being by me duly sworn according to law, deposes and says that he is

769 worth the sum of one hundred thousand dollars over and above his just debts and liabilities.

(S'g'd) GEO. W. BUSH.

Sworn to and subscribed before me this fourteenth day of August, A. D. 1889.

S. RODMOND SMITH,
[SEAL.] *U. S. Commissioner, Dist. of Del.*

STATE OF DELAWARE, *County of New Castle,* } *ss:*

On this third day of August, A. D. eighteen hundred and eighty-nine, personally appeared before the undersigned Francis N. Buck, one of the sureties on the foregoing bond, who, being by me duly sworn according to law, deposes and says that he is worth the sum of forty-five thousand dollars over and above his just debts and liabilities.

(S'g'd) FRANCIS N. BUCK.

770 Sworn to and subscribed before me this third day of August, A. D. 1889.

S. RODMOND SMITH,
[SEAL.] *U. S. Commissioner, Dist. of Del.*

STATE OF DELAWARE, *County of New Castle,* } *ss:*

On this third day of August, A. D. eighteen hundred and eighty-nine, personally appeared before the undersigned Henry C. Robinson, one of the sureties on the foregoing bond, who, being by me duly sworn according to law, deposes and says that he is worth the sum of sixty thousand dollars over and above his just debts and liabilities.

(S'g'd) HENRY C. ROBINSON.

Sworn to and subscribed before me this third day of August, A. D. 1889.

S. RODMOND SMITH,
[SEAL.] *U. S. Commissioner, Dist. of Del.*

771 Said appeal bond endorsed: Approved, L. E. Wales, J.

772 UNITED STATES OF AMERICA, *District of Delaware,* } *ss:*

[Seal of Circuit Court, Delaware.]

I, S. Rodmond Smith, clerk of the circuit court of the United States of America for the district of Delaware, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of George A. Frink and Esther S. Snyder, administrator and administratrix of the goods, chattels, and credits of C. Brown Snyder, late of the city of New York, in the State of New York, deceased, *vs.* Elizabeth B. McComb, executrix of the last will and testament of

Henry S. McComb, late of the city of Wilmington, in the State of Delaware, deceased.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Wilmington, in said district of Delaware, this tenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine and of the Independence of the said United States the one hundred and fourteenth.

[Seal of Circuit Court, Delaware.]

S. RODMOND SMITH,
Clerk U. S. Circuit Court, District of Delaware.

Endorsed on cover: Case Nos. 13,816, 13,817. Delaware C. C. U. S. No. 215. Elizabeth B. McComb, executrix of the last will and testament of Henry S. McComb, deceased, appellant, *vs.* George A. Frink and Esther S. Snyder, administrator & administratrix of C. Brown Snyder, deceased. No. 216. George A. Frink and Esther S. Snyder, administrator & administratrix of C. Brown Snyder, deceased, appellants, *vs.* Elizabeth B. McComb, executrix of the last will and testament of Henry S. McComb, deceased. Filed October 18, 1889.

149 US 629

Office Supreme Court U. S.
FILED.
APR 6 1893
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1893.

No. 215.

ELIZABETH B. McCOMB, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF HENRY S. McCOMB, DECEASED,

Appellant,

vs.

GEORGE A. FRINK AND ESTHER S. SNYDER, ADMINISTRATOR AND ADMINISTRATRIX OF C. BROWN SNYDER, DECEASED,

Appellees.

No. 216.

GEORGE A. FRINK AND ESTHER S. SNYDER, ADMINISTRATOR AND ADMINISTRATRIX,

Appellants,

vs.

ELIZABETH B. McCOMB, AS EXECUTRIX,

Appellee.

BRIEF FOR ELIZABETH B. McCOMB, EXECUTRIX, APPELLANT.

WAYNE MacVEAGH,
GEORGE H. BATES,
FRANCIS S. BANGS,
Of Counsel for Appellant.

THE EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

ELIZABETH B. MCCOMB, Executrix of the Last Will and Testament of Henry S. McComb, deceased,
Appellant,
vs.
GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, deceased,
Appellees.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix,
Appellants,
vs.
ELIZABETH B. MCCOMB, as Executrix,
Appellee.

BRIEF FOR ELIZABETH B. McCOMB, EXECUTRIX.

Statement.

This case comes before the Court on appeals taken by both parties to the controversy from a decree of the United States Circuit Court, District of Delaware, in favor of the representatives of the estate of C. Brown Snyder, deceased, complainants, against the executrix of the estate of Henry S. McComb, deceased, defendant, for the sum of $42,000, together

with $49,240 as interest at six per cent. from November 23, 1869, to July 3, 1889, making in the aggregate $91,420 (fols. 763–766).

The subject matter of the litigation consists of a subscription to stock of The Southern Railroad Association, and the 800 shares of stock issued upon the subscription, standing in the name of Henry S. McComb, trustee, of which it is claimed that C. Brown Snyder was the beneficial owner, and concerning which his estate sues to establish a trust in his favor and to secure an accounting.

The Southern Railroad Association was originally organized in June, 1868, as an unincorporated association of thirteen capitalists (fol. 143) for the purpose of leasing and operating the Mississippi Central Railroad, of which Henry S. McComb, who was prominent in effecting the organization, had previously obtained a lease for himself and his associates (fols. 130, 131). The capital of the association, $1,500,000 (fol. 132), was at once subscribed by the organizers and one or two others (fols. 143, 263–265), Josiah Bardwell subscribing for $100,000 and McComb for $415,000 in his own name and for $60,000 in the name of H. S. McComb, trustee (fol. 143). This last subscription, the stock representing it, the interest of Bardwell and McComb in it, and the transactions had relating to it, constitute the grounds of this suit. On January 14, 1869, the Association became incorporated under a special act of the Legislature of Tennessee (fols. 144–150), and to the corporation the voluntary association transferred all its property on January 22, 1869 (fols. 151, 156). At a corporation meeting held on January 21, 1869, such action was taken that the capital was fixed at $2,000,000, and stock to that amount was issued by the new corporation to the original subscribers in proportion to their subscriptions, on which from time to time payments were called according to the Association's needs. In this way each origi-

nal subscription was increased nominally by one-third, so that the Trustee subscription for $60,000, in consequence of the action of January 21, 1869, represented by 800 shares of stock.

The investment proved unfortunate from the outset. The corporation had assumed the obligations of the unincorporated association (fol. 154) as well as those of the lessor, the Mississippi Central Railroad Company (fols. 249, 486, 520, 559-565). The railroad was in bad condition, and large expenditures were required for reconstruction as well as for current repairs (fols. 487-489), which, in connection with the heavy interest charges, resulted in a constant increase of the liabilities so that the earnings never yielded a return to the stockholders (fols. 486, 489, 490). The Association was a losing concern (fol. 495), and its stock was never on the market, the transactions in it being confined almost entirely to the original shareholders (fols. 494-497). McComb, as the record shows, was the moving spirit of the enterprise, the largest investor in its stock and bonds, and the president of the corporation and its allied companies during their active existence, and to him his associates committed the general administration and control. In 1871 he sought to bring about an alliance with the Pennsylvania Company, which was then looking toward the Southern States for an extension of its business (fol. 490), and that company acquired practically a controlling interest in the Association by the creation of a voting trust covering 5,000 shares (Exhibit 3, p. 49), and by a purchase of 5,000 additional shares from McComb, the purchase being qualified by the agreement that McComb should re-purchase the stock at the end of two years at 30 per cent. advance (Exhibit 2, p. 48). The stock deposited under the voting trust stood in the following names: H. S. McComb, 600; Charles A. Lambard, 1,167; Samuel H. Edgar, 300; Jacob S. Rogers, Trustee, 1,000 (fols.

72-79); E. D. Jordan, 600; Alanson Tucker, 133 (fols. 98, 108, 109, 111); H. S. McComb, Trustee, 800 (fols. 72, 76), and the remaining 400 presumably in the name of Henry Lewis (fol. 79). Notwithstanding this arrangement, the affairs of the Association continued to decline. In 1872, the Mississippi Central Railroad Company and the association found it necessary to execute a consolidated mortgage for $8,000,000. In June, 1874, an assessment of forty per cent., which in great part was not paid, was levied upon the association's stockholders to meet obligations amounting to about $400,000 (fols. 516, 518, 519). In July, 1874, the Mississippi Central Railroad Company was consolidated with the New Orleans, Jackson and Great Northern Railroad Company under the name of the New Orleans, St. Louis and Chicago Railroad Company (fols. 485, 486). Continued misfortune followed the consolidated company. Two crevasses in the banks of the Mississippi destroyed its property, one of them obstructing the operation of the railway for nearly two months (fol. 319). A Receiver was appointed on March 10, 1876, in proceedings instituted by the Illinois Central Railroad Company to foreclose the Mississippi Central consolidated mortgage, under which the property was afterwards sold, leaving no surplus to the general creditors of the leased companies or to the creditors or stockholders of the Association (fols. 498, 508, 520, 707). The stock, which had had only a nominal value since the consolidation in 1874 (fols. 318, 319), became worthless, and the Association practically ceased to exist (fols. 503, 504).

In July, 1875, C. Brown Snyder, the complainant's decedent, brought an action against the defendant's decedent in the Supreme Court of New York, alleging that in the month of August, 1869, Snyder intrusted to McComb the sum of $46,000 to invest in the capital stock of the Southern Railroad Association, and to transfer the stock to him, and

charging that McComb converted the money so intrusted to him to his own use and never accounted therefor to the plaintiffs (fols. 445, 466–468). McComb promptly answered the complaint with a full and specific denial of the charges (fols. 469–472). In advance of the time for trial he was examined under a short order from the Judge, without any notice or request to produce, or any opportunity to refer to, documents or papers (fol. 418). His testimony so taken is in the record here (fols. 447–466). Snyder was subsequently ordered to appear for examination before trial (fols. 472–475), but he did not attend, and finally discontinued the action on January 19, 1876. His counsel, in a deposition taken in the Boston suit, being asked if Snyder ever attended for examination, or if he refused so to attend, answered, "The plaintiff Snyder did not attend for examination under said order and was never examined thereunder or otherwise on said occasion. I cannot say that he refused to attend and be examined, but only that he did not attend" (fol. 446).

In October, 1875, proceedings were also begun by Snyder against McComb in the Supreme Judicial Court of Massachusetts, at Boston, on practically the same cause of action as in the then pending New York case. The actors in the original transaction were examined at length. The case was prosecuted to a final issue, and after a full hearing and elaborate argument on both sides, resulted in a judgment for the defendant McComb, on December 23, 1878, the record of which is in evidence in this proceeding (pp. 96–106).

In that case before the final entry of judgment a motion was made to amend the suit into a bill in equity for the enforcement of the precise trust set up in this suit, which motion, after hearing, was overruled (fol. 259).

McComb died December 30, 1881 (fol. 11). Snyder died July 18, 1882 (fol. 11).

In January, 1883, the controversy, which, it was supposed, had been closed by the Boston judgment, was suddenly revived by the present proceeding, instituted by Snyder's representatives after the lapse of over thirteen years from the alleged occurrences on which it was based, and after more than four years from the entry of judgment for the defendant in Boston.

The bill of complaint in this case alleges and charges principally as follows:

That prior to November 23, 1869, Henry S. McComb held in his own name, in trust for Josiah Bardwell, an original subscription of $60,000, or $\frac{1}{25}$ interest in the property and affairs of the Southern Railroad Association, and that afterwards, but before November 23, 1869, the association had increased its capital by $500,000, by way of a dividend among its members, of which increase McComb also acquired a $\frac{1}{25}$ share as trustee for Bardwell.

That on and prior to November 23, 1869, Bardwell had paid on account of this subscription seventy per cent., and thereafter the complainants' decedent, C. Brown Snyder, paid all sums required on said subscriptions.

That about two months before November 23, 1869, Bardwell, for full value known to McComb, sold and transferred to Snyder his interest in the subscription, and required of McComb an acknowledgment that he held the trust for Snyder. That on November 23d, McComb acknowledged that he held the subscription in trust for Snyder, in accordance with previous arrangement, and thereafter held it and its accretions in trust for Snyder and not otherwise. That the Southern Railroad Association subsequently became incorporated, and stock was issued for previous subscriptions. That the association and the corporation transacted a large business and made

large profits, and the equitable share of Snyder held by McComb became very valuable, and McComb derived great profit therefrom, and that McComb derived great advantage from his own operations in connection with the railroad enterprise, of which profit Snyder was entitled to a share. That McComb, about December 1, 1871, converted to his own use the stock thus held in trust by him for Snyder, which was eight hundred shares, worth at the time $125 a share, and that Snyder never discovered this conversion in his lifetime, and the complainants had not discovered it until within six months of their bringing suit, all without any fault or laches on the part of the complainants or their decedent That McComb and his executrix have failed to account to Snyder or his administrators for the stock and the profits thus held in trust. The prayers of the bill are:

(1.) That McComb be declared to have held the subscription of eight hundred shares of stock and profits in trust for Snyder.

(2.) That his executrix be required to account to complainants for the subscription of $60,000 and the stock in the corporation and its accretions and profits.

(3.) That the complainants be declared as entitled to all benefit and advantage derived by McComb from the subscription, and to everything received by him, or to which he became entitled by reason thereof, and to the value of the stock at the time of the alleged conversion, with interest.

(4.) That the executrix of McComb be required to pay to the complainants the sums due them.

The answer of the defendant contains direct, specific and complete denials of all the material charges in the bill, and presents a full statement of the facts as they existed, out of which the controversy grew. As appears from it, McComb made a subscription to the capital stock of the Southern Railroad Association for the sum of $60,-

000, qualifying the signature of his name by the addition of the word "Trustee," which represented a trust in favor of the wife of Bardwell upon her or her husband paying McComb all indebtedness theretofore incurred, or thereafter to be incurred, by Bardwell to McComb. Upon the subscription of $60,000 there had been furnished by Bardwell about seventy per cent. thereof, but a portion of the sum so furnished by Bardwell consisted of moneys borrowed by him from McComb, or received by him upon the credit of McComb. About two months prior to November 23, 1869, for some consideration, Bardwell transferred whatever interest he had in the trust subscription of McComb to Snyder, subject to all claims of McComb upon Bardwell and upon the subscription and the interest acquired thereby, and subject to the beneficial interest of the wife of Bardwell in the subscription, and the interest evidenced or acquired by it. On November 23, 1869, McComb executed and delivered to Bardwell a paper acknowledging to hold the subscription of $60,000 in the Southern Railroad Association as trustee for Snyder, but did not execute and deliver the said paper, or any similar paper, to Snyder. After the execution of the paper McComb held the subscription and its accretions, and the interest in the property, affairs and profits of the Southern Railroad Association represented by it, pursuant to the agreement with Bardwell as security for the repayment of all sums due or thereafter accruing to him from Bardwell, and then in trust for the wife of Bardwell, and only in trust for Snyder after satisfaction of these prior claims. Bardwell died leaving his wife surviving him, and being at his death largely in debt to McComb, no part of which indebtedness was paid at date of filing of answer. The Southern Railroad Association and corporation, as stated in the answer, did not realize large profits from its business, and if any profit was realized by McComb in his opera-

tions in connection with its business, it was received in his own right as stockholder and part proprietor, and no wrongful act was committed by him in connection with the business to the injury of the complainant's decedent.

The answer also sets up affirmatively the various limitations of two years, six years, and ten years in bar of the complainants' action.

Testimony having been taken, the cause was heard before Associate Justice Bradley and District Judge Wales in the Circuit Court, District of Delaware, and a final decree rendered in favor of the complainants (fols. 730, 766). From that decree the defendant, the executrix of McComb, has appealed, and on her behalf is alleged the following

Specification of Errors.

(1.) The Court below erred in entering a decree in favor of the complainants for $42,000, with interest at 6 per cent. from the 23d day of November, 1869, to the 3d day of July, 1889, making in the aggregate $91,420.

(2.) The Court below erred in entering any decree in favor of the complainant.

(3.) The Court below erred in not entering a decree for the defendant dismissing the complainant's bill.

Argument.

Few cases, it is believed, present situations of greater hardship to a defendant than that in which this appellant will be placed if the decree of the Court below is to stand. At the time when this suit was begun, more than thirteen years had elapsed since the making of the investment which Snyder claimed as his, eight years since the absolute failure of the enterprise had become notorious,—a failure for

which McComb was not chargeable, and four years since Snyder, with full knowledge of the worthlessness of the stock and having his choice of remedies, had undertaken to recover from McComb, not the stock, but money that he said he had invested in it. McComb, and every person competent to testify in his behalf as to his acts, had in the meantime died, and Snyder, for the three years of life that remained to him after the judgment in the Boston suit, had submitted to the adverse decision upon his claim. Nevertheless, upon the same testimony that had been brought out in the previous litigation, and with no evidence casting any additional light upon the relations of the parties—upon a so called trust receipt, the creation and effect of which had once been the subject of a heated litigation, and every fact concerning which had then been brought out by the testimony of the living interested parties, the executrix of McComb is required to return to the estate of Snyder a sum of money which a court of competent jurisdiction had previously determined that McComb never received, to which is added interest, exceeding the principal in amount, calculated from the date of the very origin of the investment.

In support of the defendant's contention that the decree of the Court below was erroneous, the following propositions are urged:

I.—No such trust was established in McComb in favor of the complainants' decedent as entitled the complainants to the relief prayed for in the bill, or to the relief granted by the decree.

II.—The case is *res judicata.*

III.—The complainants are chargeable with laches.

IV.—McComb, even if a trustee for the complainants' decedent, committed no act and neglected no duty to his *cestui que trust* in respect

to the shares of stock in suit, such as makes his estate liable for their original cost, with interest, or for any other sum of money.

FIRST.

No such trust was established in McComb in favor of the complainants' decedent as entitled the complainants to the relief prayed for in the bill, or to the relief granted in the decree.

The paper upon which the complainants practically rest their case (Complaint, fol. 6) was written by McComb and received by Josiah Bardwell on November 23, 1869 (fol. 187), and is as follows:

To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an agreement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

(Signed) H. S. McComb,
Trustee.

In the opinion of the Court below, this paper, which has generally been referred to as the "trust receipt," is held, upon what the defendant contends is an erroneous view of the facts, to constitute an unqualified trust in favor of Snyder, covering the stock represented by the receipt. The defendant, however, insists that upon the uncontradicted proofs the recognition of Snyder's interest in the subscription was subject to an agreement with

Josiah Bardwell, referred to in the paper, under which the subscription was subject to prior liens in favor of McComb, which were never satisfied, to an amount always in excess of its value.

For a proper understanding of the nature of the relations between Snyder and McComb created by this paper, two points suggested on its face need to be considered with great particularity: first, the agreement with Bardwell, which the paper incorporates into the transaction; and second, the consideration upon which McComb delivered it.

The Agreement with Bardwell.

Josiah Bardwell was one of the original members of the Southern R. R. Association, subscribing in his own name on June 30, 1868, for $100,000 of its shares (fols. 129, 143). At the same time he caused a subscription for $60,000 to be made for the benefit of his wife, in the name of H. S. McComb, Trustee (fol. 266). The accounts of assessments relating to this subscription were sent to Bardwell (fols. 271, 273). Assessments upon the subscriptions had been made on July 8, 1868, and January 10, 1869, and paid by Bardwell upon his own $100,000 (Exhibit 4, fol. 270; Exhibit 7, fol. 273), but no payment upon the Trustee subscription was made, although frequently urged, until February 26, 1869, when Bardwell's four months' note for $37,580 to the order of McComb and endorsed by the latter (Ex. 2, fol. 268), was turned over to the Association and discounted (fols. 266-268, 332, 336), and eventually paid by Bardwell's firm, F. Skinner & Co. (Ex. 24, fol. 477). It was then agreed between Bardwell and McComb that McComb should hold the subscription as collateral, not only for McComb's endorsement, but for other advances made and to be made by him to Bardwell, the

surplus, if any, to go to Mrs. Bardwell (fols. 330–334, 340–342). Such additional advances amounted at that time to about $15,000 (fols. 331, 332), which were increased by a loan of $50,000 in Narragansett Steamship stock in the following summer (fols. 332, 334), and, according to McComb's undisputed statements, the subscription at the date of the trust receipt was subject to claims of his, prior to that of anybody else, to an amount between $50,000 and $75,000 (fols. 331–334; 403, 406, 412). The making of this arrangement seems to have been due in large part to the intimacy between Bardwell and McComb, which will become apparent on the perusal of the record of this case. Early in 1869, when the note was made, the credit and standing of Bardwell and his firm of F. Skinner & Co. were high (fol. 294), but they became involved afterwards, greatly to the distress of Bardwell (fol. 295; Ex. 14 and 15, fols. 281, 299–301), who appealed urgently to McComb for aid, and finally failed late in 1869 (fol. 294).

According to the uncontradicted testimony, such was the character of the agreement between McComb and Bardwell to which the receipt in terms referred, and such were the liens of McComb upon the subscription, subject to which Bardwell's transfer of his interest to Snyder was recognized by McComb in the language of the receipt. There is not a scrap of evidence that Snyder had contributed anything to the seventy per cent. paid upon the subscription, and instead of McComb receiving any money in payment for it, the amount of the first payment upon the subscription was borrowed by Bardwell upon McComb's credit, while further calls after the delivery of the note, and prior to the date of the receipt, were paid by Bardwell's own acceptances (fol. 304). These calls, stated according to their amounts and dates, irrespective of

interest and dates of actual payment, were as follows:

July 8, 1868 (Ex. 6, fol. 273)	$24,000
January 10, 1869 (*Id.*)	6,000
January 21, 1869 (*Id.*)	4,000
March 2, 1869 (Ex. 5, fols. 271, 272)	4,000
September 20, 1869 (Ex. 5, fol. 271)	4,000
	$42,000

After the date of the receipt, calls were made on March 1 and 15, 1870, which were settled by Bardwell on April 28, 1870, by delivering to the Treasurer of the Association his two notes, payable in five months (Ex. 3, fol. 269). The first of these two notes fell due on August 25, 1870, and was paid by his firm, F. Skinner & Co., but the second, due September 2, 1870, went to protest (Ex. 24, fol. 477).

The Consideration for the Delivery of the Receipt.

After the making of Bardwell's note of February 26, 1869, another set of transactions was initiated between him and McComb, relating to an entirely different matter, and yet the effort to establish a connection, which never existed, between it and the Southern R. R. Association subscription, has been the fruitful source of the long litigation, of which this suit constitutes the last chapter.

The theory of the complainants is that, McComb in 1869 came into possession of $45,000 furnished by Snyder as the contribution of Josiah Bardwell to the margin money of a stock speculation made by McComb, Bardwell and others in the stock of the Chicago and Rock Island Railroad Company; that after the close of the speculation the money so contributed was not returned to Snyder, but $42,000 of it was applied to a subscription to stock in the Southern

Railroad Association, in recognition of which the paper of November 23, 1869, was given by McComb.

It was upon this theory that the Boston suit was grounded, and the allegations of the complaint in the present suit as to Snyder's interest in the subject matter of the receipt are supported by nothing else than Snyder's testimony in the Boston case (fols. 171, 172, 178–183), and upon a receipt by McComb to Bardwell, and a memorandum attached to it bearing Snyder's signature, both long antedating the Boston case, which were found among Snyder's papers after his death (fols. 185–187), viz:

Received Boston, April 22d, 1869, of J. Bardwell his three drafts of $15,000 each, thirty, forty and fifty days date, on Strang & Snyder, New York, being in payment for one-fourth interest in 10,000 share transaction in the stock of the Chicago and Rock Island Railroad Company, to be managed by John F. Tracy, as agreed between myself and said Tracy through Smith, Randolph & Co. of New York, as brokers for the account of myself and Bardwell.

H. S. McComb.

On the next sheet to the above paper is the following memorandum:

The three drafts mentioned in the foregoing receipt were paid by Strang & Snyder and by them charged to my account on their books after the transaction in Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but $42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt as trustee, dated November 23d, 1869.

C. B. Snyder.

Boston, January 23d, 1870.

This theory, declared by a writing over his own signature, and litigated by Snyder in his lifetime,

constitutes of course the only tenable ground for the complainants as to the origin of the trust acknowledgment of McComb. Beyond it or against it the complainants, the administrators of Snyder, may not go.

The testimony in the case, consisting in great part of a series of writings that passed between the parties to the transactions, and all of which is from the record of the former suit in Massachusetts, makes a complete history of the events, and shows Snyder's version of the facts, as stated in his memorandum, to be untrue.

The facts are that, early in the year 1869, Josiah Bardwell and H. S. McComb entered into a speculation in stock of the Chicago, Rock Island and Pacific Railroad Company (fol. 277), and of the money required as margin Bardwell was to pay McComb about $50,000 in cash (fol. 278). On April 21, 1869, Bardwell writes to McComb a letter (Ex. U, p. 116), indicating financial distress, in which he refers to the Rock Island speculation and asks McComb to pay the necessary margin, saying that he had been depending upon payment of a mortgage for $40,000 due April 1st. If he was dependent upon Snyder, this letter indicated nothing of the kind. On April 22d he gave McComb three drafts on the firm of Strang & Snyder, New York, each for $15,000, dated April 22d, due respectively thirty, forty and fifty days from date (fols. 184–185), for which McComb gave the receipt of April 22d (fol. 185), which identifies Bardwell as the source of the $45,000, and applies it in payment for a one-fourth interest in a speculation "*for the account of myself and Bardwell.*" McComb had the drafts discounted, and deposited the proceeds, $44,709.38, with his brokers, Smith, Randolph & Company, of New York (fols. 282, 283; Exhibit 9, fol. 283), without knowledge or information as to the account or consideration for which the drafts were drawn,

other than appeared upon their face (fol. 282), and without handling the proceeds.

At the close of the speculation McComb made his settlements with Bardwell. The principal was returned to Bardwell by McComb's draft on Smith, Randolph & Co., dated August 4, 1869, for $44,709.38, which Bardwell deposited with his firm of F. Skinner & Co. (Int. 81, fol. 288; Ints. 229, 230, fol. 322; Int. 270, fol. 423; Ex. 24, fol. 477).

On August 6, 1869, McComb paid Bardwell $2,500 on account of profits (fols. 284, 285), and on September 15, 1869 (fol. 287), wrote Bardwell, rendering a final statement by which it appeared that the amount remaining due to Bardwell for profits was $34,219.89. Bardwell replied on September 17th (Exhibit T, fol. 481), requesting a remittance in the shape of an acceptance of Bardwell's drafts at five months, with interest at seven per cent. from September 15th. On September 23d, McComb paid Bardwell $2,000, and about the same time accepted Bardwell's five drafts (Exhibit S, fols. 478–480), as proposed in Bardwell's letter. The $34,219.89 balance of profits, with five months' interest, amounted to $35,217.94; the five acceptances amounted to $33,207.80, which, with the $2,000 paid by check, made $35,207.80, leaving an unexplained difference of ten dollars and fourteen cents, due probably to some adjustment of interest. It, therefore, appears conclusively that the whole amount of Bardwell's interest in the Rock Island speculation was restored to him, principal and profits, by September 23, 1869.

The principal and profits belonging to Bardwell having all been paid by McComb, there is no support for the complainants' theory that the basis or consideration of the trust receipt of November 23, 1869, in Snyder's favor, was an obligation to restore to Snyder the principal money which he asserted had been contributed by him in the Rock Island speculation.

The further claim that $42,000 of the proceeds of the speculation was applied to the subscription to stock of the Southern Railroad Association in the name of H. S. McComb, trustee, does not accord with the facts. McComb certainly made no such application of the money, because, as we have seen, he paid the whole amount of both principal and profits to Bardwell in August and September, 1869, and the assessments on that subscription were paid by Bardwell or his firm directly to the Treasurer of the Association, as has been shown (*supra*, p. 14), the first three by his four months' note for $37,580, on February 26, 1869, several months before the Rock Island speculation was begun. Therefore, whatever may have been the impression upon Snyder's mind in regard to the speculation and its proceeds, the evidence is altogether beyond dispute that McComb had no knowledge of him in the transaction, but dealt with Bardwell as the only other interested party. McComb had neither conversation nor correspondence with Snyder on the subject (fol. 278); he never had a money transaction with Snyder (fols. 419, 420, 461, 464, 465). The dealing is with Bardwell, and Bardwell alone. Bardwell agrees with McComb to contribute margin (fol. 278); when the time comes to pay it on April 21, 1869, Bardwell writes McComb a letter asking McComb to pay the margin for him (fol. 281), and on the next day gives his drafts on Strang & Snyder to McComb, for which McComb gives the receipt to Bardwell in which the transaction is mentioned as "*for the account of myself and Bardwell*" (fol. 185); at the end, Bardwell directs the manner in which the final payment of profits shall be made, and the payment is made to Bardwell by check (fols. 285, 286), and by acceptances of Bardwell's drafts (fols. 478, 480).

In the light of these facts, Snyder's assertion in his memorandum that the proceeds of the speculation were not returned to him is of no consequence

to McComb; McComb returned the money and profits to Bardwell, from whom the money had been received, and who was the only person he had known in the matter.

If Snyder had any connection whatever with the Rock Island speculation, McComb was in ignorance of it until the reference to it, made by Bardwell, in his letter of September 17, 1869, in which, requesting the five acceptances representing the profits, he says: "With these I will settle with Snyder and parties in interest. When I see you, I will tell you how I have settled with Snyder and others, that you may agree with me that it is fair and right" (fol. 348). This, McComb has declared, was the first intimation that he had had that Synder had anything to do with the matter (Cross-Int. 171, 172, 177, fols. 349, 350).

It appears that the principal of the Rock Island speculation returned to Bardwell by McComb on August 4th, 1869, was deposited by Bardwell with his firm, F. Skinner & Co. (Ex. 24, fol. 477), and entered on its books to the credit of McComb, a fact unknown to him until it was brought to his attention on the trial at Boston in 1878 (fol. 423). Snyder, who claimed to have advanced to Bardwell the original money for the speculation, may not have been informed of the payment of the sum by McComb, although it is clear beyond a doubt that such payment was made. But obviously, even upon the supposition, very liberal for the complainants, that the money contributed by Bardwell for the Rock Island speculation was, in fact, furnished by Snyder, McComb's transactions with Bardwell cannot be affected with the consequences of a relation between Bardwell and Snyder, of which he was wholly ignorant at the time, particularly in view of the fact that he repaid the money in full to the person from whom he had received it.

The situation then was that McComb owed nothing

either to Bardwell or Snyder, but Snyder was *Bardwell's* creditor for the $45,000, the repayment of which Bardwell had concealed. How utterly mistaken Snyder was as to the truth, is shown by his statement on the Boston trial (fol. 178) that the assessment on the trustee stock *was paid out of money in the hands of F. Skinner & Co. of mine—paid to the then treasurer of the corporation,*" when in fact the $37,580 payment was made by F. Skinner & Co. long before Bardwell had deposited the Rock Island money with that firm (Ex. 24, fol. 477).

The theory of the complainants, therefore, which seems to constitute the basis of their case, that McComb's receipt of November 23, 1869, was practically a statement by him of a legal or equitable relation to Snyder growing out of a contribution by Snyder to the original subscription of sixty thousand dollars held by H. S. McComb, trustee, (which contribution was said to consist of the retention by McComb for such purpose of moneys used in the Rock Island Railroad Company speculation) utterly fails, because the statements upon which it is founded are not facts. Judge Wales' finding (page 302) that McComb had "had the use of the money, which belonged to Snyder by the assignment of Bardwell," and that it had gone into McComb's estate and remained unaccounted for, is flatly in conflict with all the evidence that has ever been given in this protracted controversy, and the decree that, therefore, McComb's estate should restore the money, whether with or without interest, should not be permitted to stand.

The nature and effect of the receipt may consequently be considered, unembarrassed by any pretense that McComb had ever received its cost from Snyder, directly or indirectly.

Further consideration of the receipt must be had in connection with the evidence as to the actual personal

dealings of the parties, bearing particularly in mind the entire independence of McComb's dealings with Bardwell, and Bardwell's dealings with Snyder.

It is evident from the correspondence between Bardwell and McComb, and from the well established course of events, that throughout 1869 Bardwell was in trouble personally about money. It was not until February, 1869, that he paid assessments on the $60,000 subscription, the most of which had been called for in the previous month of July; and then he paid it by the four months' note, endorsed by McComb. The note itself he did not pay. It was paid by his firm.

In his letter of April 21, 1869, previously referred to, he wrote to McComb that he had had a hard four weeks of sickness, heavy payments, dull trade, &c., &c., and that he had got behind, and that one by one he was bound to resolve his matters, so that he could have an hour's breathing spell. He was unable to furnish the cash for his share of the margin on the Rock Island speculation, and McComb had to raise it for him by endorsing and discounting his drafts on Strang & Snyder.

On September 15, 1869, McComb wrote him asking if he should pay the trustee call due September 20th. His condition of mind is well reflected in the two following letters (pp. 123, 124, Ex's. 14 and 15):

BOSTON, Sept. 30, 1869.

My Dear McComb:

I was at Newburyport yesterday afternoon, and did not get your tel. until this morning. Barry tel. at the same time for us not to use $80,000 of his d'fts in Philadelphia, and this draws us short here and in N. O. for the week, and this is not all, I promised Bates to pay $35,000 to-morrow to the U. P. R. R., and again $70,000 which I should have received yesterday in New York from my auction sale will not be paid until next week, so I could not turn the corner as I ought to have been able to have

done with a decent balance. Again Strang advised me that he had the promise of a $40,000 discount today. I sent him $60,000 Washington Mills paper, 70 days to run, he telegraphed at 12 o'clock; Bank has broken its promise, so with all I must have another 24 hours to turn.

I do not know the fact, but I think matters will be no worse next week, yet I don't like these times.

Yours always,

J. BARDWELL.

[PERSONAL.]

BOSTON, Oct. 5, 1869.

My dear friend McComb:

I am in trouble, and first to you I write. I left here Saturday night for New York, and returned Sunday night; since Sunday I have not closed my eyes. I have been duped and swindled by that man Barry, and it is my own fault that makes the matter so much the worse. I had his honor pledged to me, and were credulous enough to believe. Since September 23, I have paid $260,000 for him. From a sick bed he came to see me in New York, Sunday, when my worst fears were realized, he owned that he had lost $120,000 in stocks. After talking with him six hours I left, feeling disgusted and *tired*. I only fear now that I do not know the worst, he owes me $700,000, and I fear he has misapplied or used some $150,000 of acceptances, he said he had them on hand unused, but I have reason to think otherwise, when he told me that there were no more drafts on us, and that as it stood Friday, so it was and no more. I came home to find his drafts for $35,000 drawn on Saturday, these of mine have gone back. The sufferings of hell cannot compare but unfavorably with mine, but I wont write more.

Yours always,

J. BARDWELL.

Don't say a word about this to any one.

On November 18th he sent McComb a power of attorney to transfer the 1333 shares of Southern Railroad Association stock which stood in his own name (Ex. 12, p. 123). This was undoubtedly the $100,000 interest originally subscribed for in Bard-

well's name, with the subsequent increase of 333 shares. The purpose of sending the power of attorney to McComb was that he might hold the shares as collateral security for $60,000 which had just been advanced by McComb to Bardwell (Int. 118, fol. 296).

About September 21, 1869, McComb and Bardwell had an interview in Boston, during part of which Snyder was present (fols. 360–366). It must be recalled that on August 4th Bardwell had received back from McComb the $45,000 of money advanced to Bardwell by Snyder, unknown to McComb, for the principal of the Rock Island speculation (fol. 288), and in the letters of September 15th and 17th (fols. 287, 481) between Bardwell and McComb it had been arranged to pay over the profits of the speculation. Bardwell, however, had not repaid the $45,000 to Snyder, but had deposited it with F. Skinner & Co., and as far as the documents show (Ex. 24, fol. 477) Snyder was not advised of that fact until November 20, 1874. McComb, in the Massachusetts record, has described the interview as follows:

Cross-Int. 247. Now, I will thank you to repeat what took place at that interview as fully as you can? Ans. Well, sir, my recollection was that Snyder asked Bardwell to have that stock matter fixed; something like that; that was about the substance of the language—that interest in the Southern Railroad Association—and Bardwell remarked to me that he had gotten some money from Snyder on a mortgage, and he was going to give him his interest, subject to any claim in that stock, if I had no objections. Cross-Int. 248. Did he tell you how much money he had got from Snyder? Ans. No, sir. I think he said about $40,000, as near as I can remember. I don't think now a dollar more. Cross-Int. 249. He said, subject to your claim? Ans. Yes, sir (fol. 361).

* * * * * *

Mr. Bardwell told me that Mr. Snyder had given him some money from a mortgage, and that he

wanted to transfer to him, subject to the arrangement that was made between Bardwell and myself, the trustee stock as security (fol. 291).

* * * * *

The arrangement made with Mr. Bardwell was that some acknowledgment should be made of this stock standing in my name as trustee. Int. 100. Can you tell me exactly what each party said in making this arrangement. A. I can not; I am giving the substance; Mr. Bardwell remarked to me that he had gotten money from Snyder and he wanted to give him an interest in this Southern Railroad Association stock, and wanted from me a paper to that effect, he pledging himself that he would make good to me whatever difference it made in his transaction with me. That is about the substance of it (fol. 293).

* * * * *

Cross-Int. 269. When Bardwell's indebtedness was paid what did you agree with Mr. Snyder in September about that stock? Ans. That I should hold that stock as it then was, the profits of it to go to Mr. Snyder until his $40,000 was returned, the principal of it always to remain with me until Bardwell's indebtedness to me was paid. That is all I remember. Cross Int. 270. How were you going to separate the profits from the principal of the stock? Ans. The same way that everybody does that—by the declaration of dividends. Cross-Int. 271. You were going to give the dividends, then, to Mr. Snyder, were you? Ans. That is my understanding—that he would have a right to those. Cross-Int. 273. And then you were to hold the principal until you got back your money? Ans. Whatever was due to me. Cross-Int. 273. Whatever was due to you or became due to you? Ans. Yes, sir; whatever was due to me (fols. 364, 365).

* * * * *

Cross-Int. 278. After that arrangement with Snyder did you consider it was still held for future advances that you might make? Ans. Yes, sir; subject to the original agreement that the profits went to Mr. Snyder (fol. 366).

On September 23, McComb closed the Rock Island transaction with Bardwell by paying $2,000 and accepting Bardwell's five drafts for $33,207.80, representing the entire profits of the speculation. From these drafts comes the first evidence of Snyder's connection with Bardwell's share, three of the drafts, amounting to $19,924.64, having been endorsed by Bardwell to Snyder, two of which were endorsed by Snyder to the firm of Leland, Allen & Bates (Exhibit S, fols. 478, 479). It is hardly to be supposed that Bardwell could have accounted with Snyder respecting the profits of the transaction, and that nothing should have been said between them respecting the principal of the investment.

It is important to recollect that Snyder swore in his complaint in the New York suit, that in August, 1869, he had entrusted to McComb $46,000, upon an agreement that McComb should invest the same for him in the Southern Railroad Association stock, and thereupon transfer the stock to him, which he had not done; and that in the second bill of particulars in the Boston suit, Snyder charges McComb with $45,000 as having been in McComb's hands and retained by him for the purchase of the Southern Railroad Association stock. He must, therefore, have been misinformed by Bardwell or not informed at all, as to the repayment by McComb to Bardwell of the $45,000; or else, if he knew the fact as to that, his statement under oath in the New York suit was untrue.

About two months after the Boston interview and McComb's settlement of the Rock Island account with Bardwell, the following correspondence takes place (Exhibit W, p. 86):

My Dear McComb:

Will you please acknowledge that you hold in "the Southern Association," as trustee, for (the benefit), or rather for C. B. Snyder, that am't of

stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest.

Yours truly,
J. BARDWELL.

BOSTON, Nov. 12th, 1869.

McComb replies (fols. 187, 188, p. 77):

"Office of H. S. McComb,
WILMINGTON, Del., Nov. 22, 1869.

Josiah Bardwell, Esq.,
Care of F. Skinner & Co., Boston.

Dear Sir—I send this (acknowledgment as trustee) the first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes, in any manner, please return it to me with such instructions to be carried out as you shall see disposed to make.

Yours truly,
H. S. MCCOMB.
M."

Enclosed in the last letter was the trust receipt as follows:

(*Memo. in Bardwell's Handwriting*—"Rec'd Nov. 23, 1869.")

To whom it may concern:

I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an agreement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

H. S. MCCOMB, *Trustee*."

At some undisclosed time afterwards Bardwell must have delivered this receipt to Snyder, leaving Snyder under the impression that his advances to Bardwell for the Rock Island deal were still in McComb's hands unpaid, for Snyder, on January 23, 1870, attaches the following memorandum to

McComb's receipt of April 22, 1869 (fol. 185), which had also come into his hands:

"The three drafts mentioned in the foregoing receipt were paid by Strang & Snyder, and by them charged to my account on their books after the transaction in Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but $42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt, as trustee, dated November 23, 1869.

"C. B. SNYDER.

"Boston, January 23, 1870."

We have then at this point, Snyder's first actual connection with the Southern Railroad Association, under a misunderstanding by both parties of the real situation, and a befogging of their relations caused by Bardwell's disingenuousness. He had brought Snyder to believe that the latter's $45,000 had not been repaid, but had been used by McComb to pay for the trustee stock, while he had induced McComb to believe that he had transferred his interest in the stock, subject to McComb's liens, in consideration for $40,000 that Snyder had given him out of some mortgage (fol. 291). Two months had elapsed since the final turning over by McComb to Bardwell of the Rock Island money, during which period, unquestionably, Bardwell alone was the owner of the beneficial interest in the stock, subject to McComb's liens to the amount of from $50,000 to $75,000, and there was no money in McComb's hands to which Snyder directly or indirectly could lay claim. During that period no part of Bardwell's debt to McComb was paid. Why then, on November 23, 1869, should McComb gratuitously surrender his lien upon the subscription and transfer the beneficial interest in the subscription to Snyder unencumbered and with-

out qualification? This is what he must have done if the theory of the complainants is to be believed; but that he did so is in the highest degree improbable and contrary to the plain purport of all the testimony.

The inquiry may be made right here: If Snyder did not then know that Bardwell's assigned interest in the stock represented by the receipt was subject to Bardwell's debts to McComb, why did he leave all the certificates of stock and all other evidence of ownership in McComb's hands for four years afterwards and remain content with an unmarketable bit of paper such as the trust receipt? It will be observed that McComb's letter of November 22 contained a distinct request to Bardwell to return the receipt accompanying the letter, if it was not in conformity to his wishes. No answer was ever received to that request, the acknowledgment was not returned, and nothing was ever said to indicate that it was not in conformity with the wishes of all parties (fol. 305). It must be taken for granted, therefore, that the receipt shows the true nature of his trusteeship to Snyder, as to the stock, to be that McComb held the stock as trustee for Snyder "*under an agreement with Bardwell * * * * in accordance with an arrangement made some two months since.*"

So much for the origin of the receipt.

Next follows the interpretation of it by the parties.

After the lapse of nearly four years after Bardwell had received from McComb the trust receipt, we find the following letter from Cutter (a partner of Bardwell) to McComb with the latter's reply (Exhibits 21 and 22, p. 86):

BOSTON, Oct. 25, 1873.

H. S. MCCOMB, Esq.:

Dear Sir,—Yours of the 21st was duly received. Happy to have served you, and you will command me when I can be of use to you. Mr. Bardwell is

quite well, and although financial matters are rather mixed here, he appears to keep up his usual good spirits. Are the interests of F. S. & Co. in the Southern R. R'd Association, on which you advanced 60 M. dollars, still intact, and are they worth the loan and principal? How does the 60 M. of Mr. Snyder's stand affected?

Yours truly,
EDMUND F. CUTTER.

WILMINGTON, Del., Oct. 27, 1873.

E. F. CUTTER, Esq., Boston, Mass.

Dear Sir,—The Southern R. R. Association stands all right and everybody's interest stands upright and square.

Yours truly,
H. S. MCCOMB, Pres.

These letters throw no light whatever upon the subject of the present controversy, although it has been argued that Mr. Cutter's incidental reference to "the 60 M. of Mr. Snyder's," might be considered as indicating a knowledge of Snyder's having some interest; but the fact is that a subsequent letter of Cutter shows conclusively that he knew nothing concerning the Bardwell-Snyder relation to McComb or the Southern Railroad Association, for on November 20, 1874 (Ex. 24, fol. 477), he advises Snyder of the receipt by F. Skinner & Co. of $44,709.38, and a previous payment of $37,580, and says: "The above receipt and payment" (by F. Skinner & Co.) "being on account of your subscription to the Southern Railroad Association." From the record, the Court is aware that the first item was the amount returned by McComb to Bardwell for the principal of the Rock Island speculation, and that the payment mentioned was the payment of Bardwell's assessment note by his firm, which could not well have been made on Snyder's account, since it was on June 29, 1869, four months prior to the date of the trust receipt, and two months and a half prior

to the time at which, according to the trust receipt, some arrangement about the trustee stock had been entered into between Bardwell and Snyder. Thus the record shows that Cutter was ignorant of the real nature and details of the transaction, whatever it was, between Bardwell and Snyder. A view of the whole case will doubtless satisfy the Court that Bardwell purposely kept his partners in ignorance, but it is sufficient to note here that the written evidence establishes *the fact* of ignorance on the part of one of them.

After a further period of nine months had passed the active correspondence between the parties begins, and as bearing on the claim that Snyder had an absolute right to the beneficial interest in the trustee stock, free of all prior liens or incumbrances, the correspondence is of the utmost importance. As put in evidence in this case it is all taken from the Massachusetts record.

On June 3, 1874, Bardwell writes to McComb enclosing a letter from Snyder, marked "Confidential" and referring to an enclosure, which apparently was a copy of the trust receipt (Int. 165, fol. 309). The letter of Bardwell was as follows (Ex. 16, p. 127):

BOSTON, June 3, 1874.

My Dear McCOMB—

I expected to hear from you this morning on the Snyder matter. I enclose memo. of agreement, S. R. R. Ass'n, this will show the understanding as is.

Mr. Snyder needs 30,000 to 35,000 in some way to help him out, and if he gets in bonds or otherwise, that which will help him over for 60 or 90 days, his interest as well as mine will be served; as I may learn from you so shall I go to New York to morrow or Friday, or not.

Please let me learn from you, if you understand the enclosed as I do, and if so, help me to relieve Snyder, as we talked when I was in New York.

Yours truly,

(Signed) J. BARDWELL.

The following letter of Snyder was enclosed (Ex. E, fol. 203):

BOSTON, June 3, 1874.

(Confidential.)
H. S. MCCOMB, Esq.:

My Dear Sir—At the request of our friend, Mr. Bardwell, I send you the enclosed. This gives me the opportunity to tell you in *confidence* the state of the case. I have unexpectedly been called on to pay $40,000, a debt of F. Skinner & Co. and myself, which I supposed was paid long since. Not owing anything, my means are all invested in a way that I cannot reach them at present. I can get along with $30,000. What I want is for you to let me have in some way the above amount ($30,000) so that I can use it at once, and then you can reimburse yourself from the sale of consolidated bonds when they are issued. If you can do this you will render a great favor to Mr. B. and myself, and I will be under obligations to you. Please let me hear from you.

Yours truly,

C. B. SNYDER.

McComb replied (fol. 189):

"Office of H. S. MCCOMB,
WILMINGTON, Del., June 15th, 1874.

C. B. SNYDER, Esq.,
Care of Mr. Josiah Bardwell, Boston.

Dear Sir,—I have your letter, with Mr. Bardwell's and the memo. given by me to you, through Mr. Bardwell; but I do not know how I can help you.

I will do anything I can consistently with the obligations that are already on me, and hope to be able, at the meeting on Monday next, in New York, to suggest something that will relieve you and not hurt me. You can depend upon my doing everything I can reasonably be expected to do in the matter.

Yours truly,

H. S. MCCOMB."

These letters, one from each of the parties most concerned in the subject matter of this suit, merit

close examination. They certainly negative both in their matter and *tone* the existence of any such state of facts as the theory of this suit requires for its support. Bardwell's letter refers to a conversation, the evidence of which we shall hereafter examine. It is sufficient now to observe that no one of these three letters can be presumed to have been written by any sensible man, if there had existed the mutual relation on which alone this suit can succeed. If the complainants have any standing in Court, McComb was holding, as trustee, stock of which Snyder had acquired the absolute and unqualified beneficial interest. He must have been entitled to demand and receive an immediate transfer of 800 shares of stock in the Association. There was, on this theory, no trust left except to turn over that amount of stock to Snyder, since Bardwell had no further interest in it—he had parted with it all—transferred it to Snyder for a valid consideration. If such was not the case at the date of this correspondence this case has not a leg to stand upon.

How can these letters be squared with such a theory? Bardwell's plea is not to " help Snyder by an advance on account of *his* stock or *his* interest which I sold him," but in some way by letting Snyder have $30,000 to $35,000 in bonds or otherwise, to " *help him over for* 60 *or* 90 *days*," and if McComb will do that, " his (Snyder's) interest *as well as mine* (Bardwell's) will be served."

" Please let me learn from you if you understand the enclosed as I do, and if so, *help me to relieve Snyder*, as we talked when I was in New York." Certainly this language is utterly inconsistent with any such absolute ownership of the stock in Snyder as the complainant's case demands for its very foundation.

But Snyder's letter is no better for the complainant's theory. He says: " This gives me the opportunity to tell you in confidence the state of the

case." He has been unexpectedly called on to pay $40,000, a debt of F. Skinner & Co. and himself, which he supposed was paid long before. He can get along with $30,000, and wants McComb "in some way" to let him have that amount. "If you can do this you will render a great favor to Mr. B. and myself, and I will be under obligations to you."

Is this the language of one absolutely entitled to stock of the par value of $80,000, and which the complainants undertake to prove was valued a short time previously at least forty per cent. above par (fols. 227-230)? If Snyder owned the trustee stock untrammeled by Bardwell his letter is absurd. All he had to do was to ask McComb to advance upon it, and, if he refused, demand a transfer and take his stock into the market and borrow what he could upon it. If McComb had refused to transfer, and the complainants' theory is correct, Snyder could have compelled a transfer. A bill in equity to establish the trust would have been as good then as now. Not a syllable of new evidence upon the existence or character of the trust is alleged or shown.

If, however, Snyder's interest in the trustee stock was a contingent one, dependent either upon a prior interest of Bardwell or Bardwell's wife, or upon the prior satisfaction of claims of McComb upon the stock growing out of Bardwell's indebtedness, then the letter of Snyder is intelligible, and not, as it would be upon the other theory, insensible.

Turning to McComb's reply to Snyder, we find it equally impossible to reconcile either its phraseology or its tone with the Snyder theory as developed after Snyder's death. "I do not know how I can help you," he says. If the stock was Snyder's, how easy it would have been to help him, either by an advance upon it or a transfer of it. He hopes "to be

able, at the meeting on Monday next, in New York, to suggest something that will relieve you *and not hurt me*." The reason then that he did not see how he could help Snyder, was that it might hurt himself. How could that be by an advance of $30,000 on stock of such value as it is sought to show that this stock then had, if the stock belonged absolutely to Snyder. On the other hand, if McComb had himself a large interest in the stock, because he held it as security for large debts due from Bardwell, how natural his reluctance to advance the sum asked by Snyder lest it might "hurt" himself or his interests.

Finally, as to these three letters, let it be observed that the tone of them all indicates the request for a favor, not the demand of a right, to be granted to Bardwell and Snyder jointly, not to the latter alone. Their language is not that of one man demanding his rights of another, but that of a person asking for an accommodation, to which he was not in law or equity entitled. It is scarcely conceivable, if Snyder's interest in the stock was, in fact, absolute and not contingent, that such letters could have been written in such terms. A man absolutely entitled to property unlawfully withheld from him for five years (1869 to 1874) is not likely to masquerade as a suppliant in this way. We must believe that, had Snyder's interest in the stock been absolute, as his representatives claim, he could not have addressed such letters to McComb as these.

June 15, 1874, the date of McComb's letter last quoted, was, as the almanac of that year shows, Monday. The letter referred to a meeting in New York on the next Monday, which was the 22d. The next letter indicates that Bardwell and McComb did meet probably on the 22d, for on the 24th the former writes from New York, referring to a *verbal* agreement (Ex. 17, p. 130):

The WINDSOR, NEW YORK, June 24, 1874.

My Dear Gen'l MCCOMB:

I make transcript of memorandum of Snyder's benefit, undertaking to carry out myself the verbal agreement I made with you; 6 notes $5,000 each, Southern R. R. Association 4 mos., and 2 for $5,000 each, your endorsement, you to have the $42,000 Snyder's as col. security, and I will send you the satisfactory papers. I think you will send them to my care for Snyder. I did not get to sleep until 5 o'clock this morning, my face troubled me.

Truly yours,

J. B.

What the verbal agreement was, what Bardwell requested, and why McComb declined his request, and what he was willing to do *for Bardwell's sake*, not Snyder's, appears by the following testimony of McComb (fols. 312–314):

Int. 186. This letter of the third day of June, 1874, says: "I can get along with $30,000. What I want is for you to let me have the above amount $30,000." You remember that? Ans. I do. Int 187. Do you remember at one period a communication between you and a proposition involving the sum of $40,000? Ans. They were varied. Int. 188. Did that $40,000 proposition come from Snyder or Bardwell? Ans. From Bardwell. Int. 189. Do you remember at any time promising Mr. Snyder to do anything in the way of advancing him money or buying that stock or taking it off his hands in 1874? Ans. I never promised him the stock; never knew that he had any connnection with the stock, except what is stated in my letter to him; never. Int. 190. Did you actually come to an agreement with Bardwell to do something if he made good the advances on the notes; did you agree to do something if he would do something? Ans. *I agreed to let him have* $30,000 *of Southern Railroad Association notes without my endorsement, he giving me collateral for these* $30,000 notes, *and his failure to give me the collateral prevented my giving him the notes.* Int. 191. Now tell us about that scheme that involved $40,000. Ans. That was Bardwell's own

figuring. Int. 192. Well, what did he want? Ans. He wanted me to give him their notes and wanted two notes of about $5,000 each, with my endorsement. Int. 193. Your own notes? Ans. My own endorsement or my own notes. Int. 194. That was in addition to the $30,000? Ans. Yes, sir; all of which he guaranteed to take care of, but I had a little experience with his guarantee and did not care to trust it any more. Int. 195. What security did he speak of? Ans. He mentioned a large interest he had in the New England Iron Company. Then I knew nothing about it. He said it was somewhere near Boston and was manufacturing bridges, I think. At the time I had never seen it. Int. 196. Did Mr. Snyder make a proposition to you apart from that contained in the letter? Ans. He never personally made a proposition to me for notes. Int. 197. Did he ever ask you for money? Ans. Never, sir.

What Bardwell reported to Snyder on the subject and what version of the interview McComb then gave to Snyder is shown by a letter from Snyder to McComb and McComb's reply, as follows (Ex. G, p. 84; Ex. H, p. 80):

BOSTON, July 16, 1874.

Col. H. S. MCCOMB:

My Dear Sir—Mr. Bardwell stated to me, on his return from N. Y., June 30, that he had made arrangements with you to give me the notes of the S. R. R. Association, on account of my stock held by you in trust, and also that the notes would come as soon as you had time to have them made, at 4 months' time. I have waited patiently, and Mr. Bardwell has promised me the notes almost every day. I trust you will do me this favor, because I am really in a tight place, and am borrowing the money from day to day, from my friends. I would not ask you for the favor if I could possibly get along without it. Will you help me? Please let me know when you will be in N. Y., or where I can see you next week.

Yours truly,

C. B. SNYDER.

OFFICE OF H. S. MCCOMB,
WILMINGTON, Del., July 21, 1874.

C. B. SNYDER, Esq., care of Messrs. Leland, Allen & Bates, Boston.

Dear Sir,—I have your favor of the 16th.

I would have fixed what I agreed with Mr. Bardwell to do in your case, had he met me here preparatory to my going south, as he promised and as I expected he would do.

I can send you the $30,000 Southern R. R. Ass'n paper, and will do it if you will return me the paper I signed, giving you so much of the benefits of the stock which was in my name as trustee for Mr. Bardwell, and which I held by agreement from him, as collateral for advances made to him and F. Skinner & Co., which advances more than cover all this stock.

Notwithstanding this, however, I agreed with Mr. Bardwell to give him this paper to help you out; am willing now, as I always have been, to do whatever I can to help him out of his dilemmas.

I do not think that I ought to have been asked to do this much; but, still, I agreed to do it, and am ready to do it, though it will somewhat inconvenience me, because I have so many things to pay for our concerns, which keeps me beggarly poor all the time. But for my poverty I would have done more for Bardwell's sake.

Yours truly,

H. S. MCCOMB.

There is no man living whose prosperity and well being I so much desire as I do that of Josiah Bardwell, of Beverly and Boston, though of all this you need say nothing to him about.

H. S. McC.

Referring to the verbal agreement, Bardwell wrote McComb: "You to have the $42,000 Snyder's as collateral security, *and I will send you the satisfactory papers.*" The failure on the part of Bardwell or Snyder to give the collateral security required by the agreement between them (*i.e.*, to send the "satisfactory papers") prevented McComb from giving the notes (fol. 313).

How utterly inconsistent are these letters with the present theory of Snyder's position and his rights. If Snyder owned this stock and McComb had no claim upon it giving him the right to hold on to it, how strange that the latter should expect, and Bardwell, acting for Snyder, should propose or agree that, for an advance, to Snyder, the *cestui que trust*, by McComb, the trustee, on account of the trust property, there should be delivered to the latter the receipt which was Snyder's only evidence of his interest, whatever it was, in the trust property.

If Bardwell, or McComb by reason of Bardwell's debts had no interest in the stock, why was it necessary for Bardwell to make the arrangement for an advance to Snyder, or for Snyder to ask so humbly as a "favor" for his own.

McComb's reply is prompt—the notes had not been sent because Bardwell had not done what he had promised; he is willing to send Snyder the notes for $30,000, upon the return of the paper which he signed, giving Snyder not the stock absolutely, but "so much of the benefits of the stock which was in my name as trustee for Mr. Bardwell, and *which I held, by agreement from him, as collateral for advances made to him and F. Skinner & Co., which advances more than cover all this stock.*"

He says that notwithstanding this, he agreed with Bardwell "to give *him* this paper to help you out," and adds that he is willing "now, as I always have been, to do whatever I can to help *him* (Bardwell) out of his dilemmas." He does not think he ought to have been asked to do this much, but is ready to do it because he agreed to. It will inconvenience him and "but for my poverty I would have done more *for Bardwell.*"

The postscript shows how c'ear in his mind was the idea that he was doing a favor to Bardwell, not fullfilling a duty to Snyder.

Here then is a statement in writing made by McComb as to his own and Bardwell's and Snyder's relation to this stock. It is practically a contemporaneous exposition of what he meant, when he signed the receipt, by the words "under an agreement with Josiah Bardwell."

This construction is consistent with the whole body of the documentary evidence, not only of that which has been reviewed, but of that which remains to be considered.

Snyder's reply to McComb's last letter was as follows, and it suggests the awakening of Snyder's mind to the fact that the condition of things had not been correctly set before him by Bardwell (Ex. I, fol. 205):

BOSTON, July 28, 1874.

Col. H. S. MCCOMB:

Dear Sir,—Yours of the 21st came duly to hand, and I have communicated the contents to Mr. Bardwell. F. Skinner & Co. never had any interest in the money you receipted to me for as trustee, neither had Mr. Bardwell, except that I agreed to share the profits of the transaction with him after receiving the principal and interest at 8 per cent. per annum, and it was as much to help him as myself that I asked you for an advance. I cannot entertain your offer for a moment, but I will assign my interest to parties who will take what they are entitled to, no more—no less.

Yours respectfully,

C. B. SNYDER.

This is the first letter of Snyder in which he separates his interest in the subject matter of the trust receipt from that of Bardwell. He says he has communicated McComb's letter to Bardwell. What the latter said does not appear. Snyder refers to the "money you receipted to me for as trustee." McComb never had receipted to him for any money—never had a dollar from him to receipt for. McComb had returned to Bardwell the $44,709.38, the

proceeds of drafts on Strang & Snyder, but which McComb did not know had been borrowed from Snyder. That money had not been returned to Snyder. There is no direct evidence that Snyder knew at that time that McComb had returned it. The fact that Bardwell accounted with Snyder for the profits raises a strong presumption that something must have passed between them about the principal. Whether Bardwell informed Snyder that he had received the money and induced him to take the trust receipt for it; and if, so what he represented to Snyder about the interest he was assuming to transfer; or whether he left Snyder under the impression that the money remained in McComb's hands for investment in Southern Railroad Stock; these are questions which arise upon the face of the written record, and which must be considered by the Court in connection with Snyder's letter of July 28, 1874. It is proper to recollect in this connection that Bardwell was not in condition, financially, to return the $45,000; that it had been received by his firm, and had been permitted to stand to McComb's credit on the firm's books; that the firm had previously paid Bardwell's note for $37,580, given for assessments on this stock; and that Cutter, Bardwell's partner, was so ignorant of the real nature of the circumstances under which the money had been received that he referred to it as on account of Association Stock of Snyder, though received long before Snyder was concerned with that stock in any way.

McComb's letter of July 21, 1874, states the contract of November, 1869, as he understood it—as the evidence shows—from its inception to the end. If Snyder's letter of July 28, 1874, correctly states the understanding received by him of what Bardwell had agreed to for him, then it is clear that their minds had failed to meet, and there was no contract.

"*Where there is a misunderstanding as to anything material the mutuality of assent as to such*

thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In the view of the law in such case there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly."

Utley *vs.* Donaldson, 94 U. S., 47.

This principle of law the parties unconsciously imported into the controversy between them from this time forward.

For more than four years Snyder has been in possession of the receipt, but making no inquiry concerning the stock, nor claim nor interest in it, nor doing even the slightest act indicating a property right in it.

Upon the very first interchange of views between the parties that occurs after the delivery of the receipt, the misunderstanding as to its meaning becomes apparent. Snyder at once assumes a hostile attitude, and McComb, insisting upon his rights to the property, defiant. Snyder, in his letter last quoted, expresses his intention to assign the trust receipt. He does so, and this brings us to another series of paper-writings in evidence which, as they may be better examined together, are here inserted from the record. He assigned his interest to Leland, Allen & Bates by the following (fol. 190):

BOSTON, July 30, 1874.

Be it known that I, C. B. Snyder, for value received, do hereby transfer and assign to Leland, Allen & Bates all my right, title and interest to the receipt or acknowledgment of H. S. McComb, trustee (see copy annexed), and do by this transfer and convey to them all the rights and privileges belonging to me in the ownership of said receipt.

C. B. SNYDER.

Witness—O. B. COE.

Suffolk, ss.: July 30, 1874.

Personally appeared C. B. Snyder and acknowledged the above to be his free act and deed.

Before me,

O. B. COE, Justice of the Peace.

(The trust receipt of November 23, 1869, was annexed to the foregoing.)

Snyder now notifies McComb that he has enlisted his recruits (Ex. J, fol. 285):

BOSTON, July 30, 1874.

Col. H. S. MCCOMB:

Dear Sir,—For a consideration, I have assigned the receipt I hold from you, as trustee, to Leland, Allen & Bates. I was sorry to be obliged to do this, as it will affect your friend Bardwell's interest in the contemplated profits, but, as I was obliged to do something to raise money, I done the best I could.

Yours respectfully,

C. B. SNYDER.

Leland, Allen & Bates begin by requesting McComb to surrender (Ex. L, p. 79):

BOSTON, August 18, 1874.

Col. H. S. MCCOMB:

Dear Sir,—We have recently made financial transactions with Mr. C. B. Snyder, and among the securities received from him, we have your acknowledgment as trustee that you hold an original subscription for account of C. B. Snyder, trustee, for sixty thousand dollars in the Southern Railroad Association, upon which seventy per cent. (according to the wording of the acknowledgment, say $42,000) has been paid.

It is our wish that the bonds alluded to in the ack be transferred and delivered to us, and your receipt given up.

It is, however, proper to say that when Mr. Snyder assigned this acknowledgment to us, he remarked that possibly you might prefer (in order to benefit a third party) to return the money (42,000 dollars and interest at eight per cent. per annum) instead of

turning over the bonds, and desired us to give you that option.

Will you be so kind as to inform us by return mail of your wishes in the matter.

We understand that Mr. Snyder informed you some days ago of the assignment to us.

Yours resp'y,
LELAND, ALLEN & BATES.

In this letter is to be noted the actual demand for the delivery by McComb of the property referred to in the trust receipt. McComb refuses and repudiates the existence of any absolute right of Snyder to the stock (Ex. M, p. 81):

Office of H. S. McCOMB,
WILMINGTON, Del., August 31, 1874.

Messrs. LELAND, ALLEN & BATES, Boston, Mass.

Dear Sirs. Your letter of the 18th received in my absence.

Mr. Snyder's interest in the stock standing in my name in the Southern Railroad Association, as trustee, is only a contingent interest. This stock was held by me as security for advances made to a third party, before I heard of Mr. Snyder in connection therewith; and it is, therefore, dependent upon the satisfaction of the prior lien thereon.

Neither Mr. Snyder nor any other person either paid or authorized me to pay, any calls for allotments of bonds sold to shareholders under and by virtue of the authority of the shareholders in a duly called meeting, at which both Mr. Snyder and Mr. Bardwell were present.

There are, therefore, no bonds connected with or belonging to this stock.

Having now no money to invest, I am not at present a purchaser of this or any other stock, which I regret.

Yours truly,
H. S. McCOMB.

After an interval of some days, Leland, Allen & Bates write again (Ex. N, p. 85):

BOSTON, September 19, 1874.

Col. H. S. McCOMB:

Sir,—Your letter of August 31, came to hand

four or five days ago. We examined the receipt you gave as trustee before it was transferred to us, and both before and since that time have investigated the circumstances and conditions of the trust, and feel entirely certain that no third party has any claim or interest in the property. We have only to renew the request made in our letter of Aug. 18th, and add that on the 1st of October we shall, unless previously settled, place the matter in the hands of our legal adviser.

Yours truly,
LELAND, ALLEN & BATES.

McComb is unyielding and gives no heed to threats. It is perfectly clear that his understanding of the facts was such that he had no fear of a suit on this claim. He replies pointedly (Ex. O, p. 81):

Office of H. S. McComb,
WILMINGTON, Del., Sept. 21, 1874.

Messrs. LELAND, ALLEN & BATES, Boston.

Dear Sirs,--I have no reply to make to your letter other than that already made.

You are liberty to take any steps that your judgment may dictate in the matter.

Yours truly,
H. S. McCOMB.

Instead of suing, Leland, Allen & Bates, at the end of a seven weeks interval, during which they seem to have conferred with Bardwell, reopen negotiations and solicit a personal interview, which McComb promises to consider (Ex. P, p. 85; Ex. Q, p. 85):

BOSTON, Nov. 9, 1874.

Col. H. S. McCOMB:

Dear Sir,--We should be very glad to have trusteeship in the Southern R. R. Association, concerning which we have heretofore corresponded, arranged.

Several times within four or five weeks Mr. Bardwell has said that you was ready to be relieved of the trust by transferring the stock represented by your receipt.

If you will notify us mail or teleg., stating when

you will next be in N. Y., we might meet you there for the purpose indicated.

Yours truly,
LELAND, ALLEN & BATES.

WILMINGTON, Nov. 11, 1874.

Messrs. LELAND, ALLEN & BATES, 51 Avon St., Boston.

Gentlemen,—I have your favor of 9th inst., and note contents.

I will give due consideration to your suggestion, and will arrange appointment for you to meet me in New York in reference to the subject of your letter.

Yours truly,
H. S. MCCOMB, Prest.

This Leland, Allen & Bates correspondence presents McComb in an attitude which fully sustains the view that he held this stock for Snyder's use only subject to his claims upon it for debts due from Bardwell. It shows (Exhibit L) that Snyder represented to his assignees that some third party—evidently Bardwell—had an interest in the stock. The nature of this interest is explained by McComb in his letter of August 31st, to which, September 19th, Leland, Allen & Bates replied that they felt entirely certain that no third party had any interest in the property, and that unless previously settled, they would, on October 1st, place the matter in the hands of their legal adviser. The threat of legal proceedings was evidently only a threat, and was not carried out. They had thus far, probably, only communicated with Snyder, to whom the whole drift of the proof indicates that Bardwell had not communicated frankly the real terms on which McComb held the stock. On receipt of McComb's very curt letter of September 21st, they go beyond Snyder and get their information from Bardwell, and from the very much altered tone of their letter of November 9th the inference is irresistible that, upon the information obtained, they deemed it unwise to bring suit.

Here the intervention of Leland, Allen & Bates ends, and Snyder seems to be impelled to make a close investigation into the facts, for a few days later, on November 20, 1874, we find a letter addressed to him by E. F. Cutter, of F. Skinner & Co., disclosing for the first time, so far as appears in the record of the case, that the principal sum involved in the Rock Island speculation had been repaid by McComb to Bardwell on August 4, 1869, more than five years before. The letter is as follows (Ex. 24, p. 194):

BOSTON, Nov. 20, 1874.

C. B. SNYDER, Esq.:

Dear Sir,—On the 4th August, 1869, we received the sum of $44,709.38, and paid as follows:

June 29, 1869		$37,580 00
Oct. 1, "		2,305 44
Aug. 25, 1870		4,100 00
		$43,985 44

and Mr. Bardwell's note, due Sept. 2d, 1870, for $4,172.58, lays under protest as far as we know.

The above receipt and payments being on account of your subscription to the Southern R. Rd. Association.

Yours truly,

EDM'D F. CUTTER,
of F. Skinner & Co.

Let it be noted again that Cutter's statement, that "The above receipt and payments being on account of your subscription to the Southern Railroad Association" is untrue, and made in evident ignorance of the facts, because the $44,709.38 received on August 4th, was the proceeds of McComb's draft on Smith, Randolph & Co., while the payment of $37,580 on June 29th was the payment of Bardwell's assessment on the trustee stock, made by his four months' note discounted by McComb. Upon what

did Cutter base his statement? Had Bardwell been talking to him, too?

The result of Snyder's investigations is soon evident. We have a vision of Bardwell on the rack again about the "Snyder matter" (Ex. 18, 19, fol. 317):

BOSTON, Friday, Nov. 27, 1874.

My Dear McCOMB:

Thank God I am up and about again, and propose to keep so.

I wonder when I can see you, and where, is there nothing this way that requires your attention? The Snyder matter annoys me more than it can you. I should be glad to be relieved, also to put Snyder out of misery.

How about the canal property?

Truly,

J. BARDWELL.

BEVERLY, Sunday, Dec. 6, 1874.

My Dear McCOMB:

Had you answered Tuesday for the S. R. R. Ass'n meeting, I should have gone to New York to-morrow. On my own account I do not regret a later day, for I am coming so right in my health I don't want a set-back. I will be in New York Thursday, nothing preventing. *Snyder is anxious that I should go by Tuesday, but what is the use?*

Truly yours,

J. BARDWELL.

We are in a position to appreciate why Bardwell should be annoyed about the Snyder matter, but how is it possible, if the present Snyder theory be correct, that Bardwell, who must have known the facts to support it, if they existed, should consider McComb to be less annoyed than he, or why should he think it of no use to go to New York to see about it.

If Bardwell had agreed with Snyder to take the McComb trustee stock for his $45,000, which Bardwell had received but not paid him, and if he knew that his assignment of his interest in the stock

carried it to Snyder free and clear of any claims of McComb on account of debts due him from Bardwell, so that McComb held that stock solely and entirely for Snyder's use—then there was certainly no reason for Bardwell to be annoyed, or more annoyed than McComb could be. In that case a man of the temperament which he appears from his letters to have been would certainly have permitted McComb or Snyder or both "to walk the floor," so far as that transaction was concerned.

But if Bardwell, having Snyder's money returned to him, had not paid it over, but had induced him in lieu of repayment to take an assignment of his interest in the stock, and if that stock was in fact subject to claims against Bardwell, but he had either concealed or misrepresented the fact, and if Snyder was pressing, and McComb holding on to the stock, and Bardwell knew he had a right to do so unless he yielded a point as a favor to him; or if Bardwell had left Snyder under the impression that the $45,000 had been left in McComb's hands for an investment in stock for Snyder's benefit, as in substance Snyder testified in the New York suit and instructed his counsel at first in the Boston suit, then in either contingency both of these letters of Bardwell can be readily understood.

At all events, Snyder had at last come to know the truth, and in April, 1875, the claim was reassigned to him by Leland, Allen & Bates (pp. 79, 80):

BOSTON, April 3, 1875.

Be it known that we, Leland, Allen & Bates, for value received, do hereby transfer and assign to C. B. Snyder all our right, title and interest to the receipt or acknowledgment of H. S. McComb, trustee (see copy annexed), and do by this, transfer and convey to him all the rights and privileges belonging to us in the ownership of said receipt.

LELAND, ALLEN & BATES.

Witness:
O. B. COE.

APRIL 3, 1875.

Suffolk, ss.:

Personally appeared C. H. Allen, and acknowledged the above to be the free act and deed of the firm of Leland, Allen & Bates.

Before me—

O. B. COE,
Justice of the Peace.

(Trust receipt of November 23, 1889, annexed.)

Snyder thus became the owner of the claim as assignee of Leland, Allen & Bates, with no better rights than those of his assignors. The existence of anything in connection with the subject of the receipt to which any interest of his could possibly attach had in the meantime been repudiated by McComb, and as assignee he becomes affected by the notice conveyed to Leland, Allen & Bates by McComb's letter to them of August 21, 1874.

Snyder begins to cast about for a remedy. With the knowledge that McComb had repaid the Rock Island money to Bardwell, conscious of the strength of McComb's position of resistance to any claim under the trust receipt, but seeing that F. Skinner & Co.'s money had gone to pay Bardwell's note given in payment of the assessment upon the stock, and treating it as if it were his money that had gone into McComb's hands, he sues McComb in an action at law in New York in July, 1875; begins another action in Massachusetts in October, 1875, availing himself of McComb's presence in the State to attend Bardwell's funeral as an opportunity for the service of process (fols. 433, 238); discontinues the New York suit in January, 1876; proceeds to trial in Massachusetts in 1878, and is squarely defeated. His complaint is not dismissed because he has mistaken his remedy, but judgment is entered for the defendant upon the merits after a full trial of the facts.

The money that he then sought to recover, his

representatives are again seeking to gain under another guise. They are asking not for the return of the stock, but for its asserted value, based upon an alleged conversion. The ambulatory and evasive character of the claim is sufficient of itself to stamp it as at least suspicious.

The testimony of Francis C. Cross, introduced for the complainants in the present case, wherein an interview between McComb, Bardwell and Snyder in 1874, relative to this $30,000 note transaction, is described (p. 17 *et seq.*), is quite in keeping with the testimony offered for the defendant. It is part of the defendant's proofs that there was a negotiation between the parties as to McComb supplying Snyder with $30,000 of negotiable paper to help him in his needs, and Cross' testimony shows not only this fact, but that the trust receipt was to be surrendered at the same time. Where this testimony and that of the defendant conflict is in the hypothesis of Cross that the receipt was to be surrendered or sold to McComb *as consideration* for the $30,000. The evidence of McComb is clear that there was no negotiation for purchase, but that the certificate was to be surrendered at the same time as, and in addition to furnishing, security for a loan (not sale) to Snyder to tide him over his troubles for Bardwell's sake (fols. 400, 401).

In the New York case and in the Boston case Snyder alleged an agreement on the part of McComb to subscribe for him six hundred shares of the stock of the Southern Railroad Association. But lest it should appear, as it actually did appear, that no such purchase could have been contracted for at the time alleged, viz: July or August, 1869, because of the fact that the stock was entirely subscribed for at that time, a count for conversion of stock was added to the declarations in those cases. Evidence was given in Boston case as to an alleged agreement on the part of McComb to sell certain stock to Snyder

and buy it back from him at cost and interest whenever required by Snyder, and also as to a guaranty offered by McComb to Snyder covering some interest of the latter in the association, but all this was flatly contradicted by McComb. The same evidence was reproduced in the present case (page 88, *et seq.*, fols. 415–417; Int. 245–250, fols. 419–420; Int. 272–276, fol. 424). Other evidence is introduced as a support for the allegation that the stock of the association was valuable, but the uncontradicted testimony on the part of the defendant as to the actual condition of the association's affairs shows conclusively that the value of the stock was never anything but purely speculative, and was finally utterly wiped out. McComb's declarations as to its value were merely those of an enthusiast. There was no market for the stock. He evidently believed that the consolidation of the New Orleans, Jackson and Great Northern Railroad Company with the Mississippi Central Railroad Company in July, 1874, would realize all his hopes, and neither he nor anybody else could have anticipated the adverse times that followed and that resulted in the entire loss of the investment within the next three years through the insolvency of the consolidated company and the foreclosure of the mortgages.

Believing, therefore, as we must, upon all the uncontradicted testimony that advances upon the stock prior in lien to that of Snyder's beneficial interest, and greater in value than the value of the stock, were due to McComb, it would be useless to require an account to a claimant who had no practical beneficial interest in the subject of the trust. *Lex neminem cogit ad vana seu inutilia peragenda.*

The controlling consideration in the case, perhaps, is that the beneficial interest of Snyder in the trust subscription, having been only a contingent interest depending upon the prior interest being removed by payment of the advances upon it, the complainants,

representing Snyder, are really not in a position to inquire as to the condition of the trust. Until their interest becomes vested by the payment of the advances due upon the subscription, their status is little better than that of strangers. Let them tender the advances due upon the subscription, and they may rightly inquire as genuine *cestuis que trust* into the management of the trust. Their own equitable obligation to pay the advances outstanding in favor of the trustee is a prior equity which transcends every other. He who seeks equity must do equity. Until they tender these advances their equity is not apparent to demand an account in a court whose principles and rules of guidance are framed to secure justice to all.

SECOND.

The Case is Res Judicata.

The matters in controversy have already been passed upon by a court of competent jurisdiction in the suit brought by Bardwell against McComb in the Supreme Judicial Court of Massachusetts, which, begun in Boston in 1875, and terminated in 1878 in a verdict and judgment for the defendant, raised the same questions and was decided upon practically the same facts as belong in this controversy (pages 96–106).

In that case a declaration (p. 98) was first filed containing five counts: (1) That the defendant in August, 1869, agreed with the plaintiff to purchase for and have tranferred to him six hundred shares of the stock of the Southern Railroad Association, and obtained from the plaintiff $42,000 for that purpose, and $4,100 as an assessment on the stock, but

did not purchase the stock and did not have it transferred to the plaintiff; (2) that the defendant purchased the six hundred shares, but did not cause them to be transferred to the plaintiff, but had them issued in his own name and used them as his own; (3) that after agreeing as above, the defendant agreed to buy back the stock of plaintiff at any time, repaying him $42,000, and all assessments with interest; that the defendant received plaintiff's money and purchased the shares of stock, causing them to be issued in his own name, and that about February 15, 1874, the plaintiff offered to release his claim to the stock, and required the repayment of the money with interest, which the defendant refused to do; (4) that the defendant owed the plaintiff $63,088.38, which represented the $42,000 and $4,100 received, together with interest; (5) that the defendant converted to his own use six hundred shares of the stock of the Southern Railroad Association, the property of the plaintiff.

The defendant answered (fol. 245) by denying all of these five counts, and then demurred to all but the fifth, which alleged a conversion.

The plaintiff then amended his declaration (p. 102) by striking out the first four counts and inserting two others in their places. The *first* count of the amended declaration alleged that the defendant had in his possession in July, 1869, the sum of $45,000 belonging to the plaintiff with which to purchase six hundred shares of the stock of the Southern Railroad Association for plaintiff; that defendant agreed to buy it back when requested, for $45,000 with seven per cent. interest; that no stock was purchased for defendant; that plaintiff on June 19, 1874, and August 18, 1874, demanded the payment of the money with the interest, which defendant refused. The *second* count charged that the defendant owed the plaintiff $45,000 for money had and received to plaintiff's use. The fifth count of the

original declaration was not stricken out by the amendments, and constituted the third count of the amended declaration.

The defendant then answered these two counts by denial, and demurred to the third count, which alleged a conversion (fols. 252, 253). Before demurrer, however, issue had been joined on this count by answer to it as it appeared in the original declaration. The record of the case (pages 96-106) contains no evidence that the answer to this count was withdrawn, and the demurrer to it not being pressed the case was tried with three allegations at issue, the last of which was a conversion by the defendant of six hundred shares of stock of the Southern Railroad Association belonging to the plaintiff. The issue of a conversion raised by the last count is identical with the issue raised by the seventh paragraph of the present bill and answer, which respectively charge and deny conversion of this stock. Upon these issue the Court, sitting as a jury, found for the defendant.

Where a plaintiff offers evidence in relation to a claim contained in one count by his declaration, which evidence is rejected by the judge, and the plaintiff instead of striking out the count to which such evidence is applicable, suffers a general verdict to pass on the whole case, the judgment thereon will bar a new action for the claim so attempted to be established.

Smith vs. *Whiting*, 11 *Mass.*, 445.

As appears from the record, the points raised in this suit were decided in Massachussetts, and upon substantially the same facts.

Evidence of the acknowledgment of the alleged trust for Snyder by McComb's paper of November 23, 1869, and the prior and subsequent evidence bearing on its construction, much relied on in the present case, were part of the record in Massachusetts,

and were fully considered by the Court in arriving at its conclusion of facts.

Moreover, as if to make it more clearly appear that the plaintiff in Massachusetts had an opportunity to obtain and did obtain a consideration by the Court of the grounds of the action as stated in the present case, the record of the former case shows that the plaintiff, in the course of its progress, moved to amend the proceeding into a bill in equity, founded upon the paper of November 23, 1869, which had been the vital fact in that case as it is in this, in which bill as proposed were set out substantially the same charges as are found in the present bill of complaint (fols. 254–257).

The motion to amend into a bill in equity was made in accordance with Section 1 of Article 179 of the Acts and Resolutions of Massachusetts of 1865, as follows: "The Supreme Court and the Supreme Judicial Court may in their discretion and upon such terms as they may deem just, allow amendments changing a suit at law into a proceeding in equity or a proceeding in equity into a suit at law, *if the same be necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought*" (fols. 260–261). This, of course, means that if an injured person claims redress for a wrong done him, the form of his action need not stand in the way of his recovery if he is entitled to it.

The motion to amend, "after a full hearing before Mr. Justice Ames, was overruled" (page 106, fol. 257). Counsel for the plaintiff in that suit has testified concerning the record of it, "That the case was heard on the issues of fact, argued and submitted to the Judge; that he announced his decision at a later day, but postponed entering his finding until the application for an amendment to a bill in equity had been made and heard. It was made and heard at a still later day and refused, and then the finding was made and the judgment followed" (fol. 717). This

rather strengthens the contention that the complainants are here seeking to reopen an adjudicated case, for the denial of the motion to allow the amendment under the statute could only be, because, in the opinion of the Court, a change in the form of the action, as moved, was not necessary to sustain it for *the cause for which it was intended to be brought.* The Court's denial of the application after a trial of the merits, taken with the subsequent finding for the defendant on the merits, leads to but one inference, namely, that the plaintiff did not sustain his action and could not have sustained it even by bill in equity; that is, the Court decided that the plaintiff had no case either in law or equity.

The plaintiff's own theory of his bill in equity, as submitted to the Court by way of amendment, was that it was for the same cause of action as that relied on in the proceeding originally begun. This is clear from the very effort to obtain the amendment under the statute, which authorized amendments into bills in equity provided the original cause of action was preserved.

If, therefore, the cause of action stated in the bill in equity, as proposed by way of amendment and refused, was practically the same as the cause of action contained in the declaration, the issues in which were determined for the defendant, it becomes important to compare the bill in equity in the present case with that proposed in the Massachusetts case. Such comparison will inform us as to what extent the questions of fact and law raised in the present bill are really *res judicata* because of the finding in the Massachusetts case. The comparison will show that there is little material difference between the two bills. Each alleges a trust in McComb in favor of Snyder as acknowledged in the paper of November 23, 1869, and prays that such trust be declared (fols. 6, 12, 254, 256). Each charges a conversion of the sum of money or the stock represented by the trust receipt

(fols. 8, 256), and prays for an accounting thereof (fols. 13, 257), and these are the *essential* allegations and prayers of the bills. Clearly, therefore, by asserting substantially the same alleged equities as were asserted by their predecessors in title in a previous suit once practically determined, the present complainants meet with a *res judicata* which may not be ignored.

Under the guise of an original proceeding they are demanding the reopening or review of a determined case. They practically concede this by averring in their bill and endeavoring to show in their testimony that certain new matter has been discovered by the representatives of Snyder, which was unknown to the plaintiff in the former proceeding.

This new matter consists of three agreements showing certain transactions between McComb and the Pennsylvania Company in 1871 as to some stock of the New Orleans, Jackson and Great Northern Railroad Company and the Southern Railroad Association (pp. 48–50). It is practically claimed by the complainants that these papers indicate that McComb used the trustee stock to his own large profit, for which profit he is accountable to the alleged *cestui que trust.*

The facts are that McComb, as shown by the agreements, in order to ally the interests of the Pennsylvania Company, of which Thomas A. Scott was then president (fol. 123), with the Southern Railroad Association lines, "only for the purpose of enabling it" (the Pennsylvania Company) "so to manage and control each of said companies" (the New Orleans, Jackson and Great Northern R. R. Co. and the Association) "*as may best conduce to the development and extension of their business upon said lines of railway*, or any extensions or connections which may be found advantageous, *in order that the same may be made to yield the best practicable results for the owners of the capital stock of said*

companies" (fol. 122), sold 5,000 shares of Asssociation stock to the Pennsylvania Company, agreeing to repurchase it at thirty per cent. advance upon the price paid at the end of two years from November 8, 1871, the date of the agreement. At the same time, a part of the transaction and in further execution of the same purpose, he transferred to the Pennsylvania Company, without change of title and for voting purposes only, 5,000 additional shares belonging to himself and several other persons. The equitable interests in the latter shares of stock were preserved, and the Pennsylvania Company undertook to execute all necessary assurances to secure such interests at any time when it should be required to do so (fols. 122, 123).

The stock thus sold with the obligation to repurchase at an advance, was the personal stock of McComb, which he had a perfect right to sell and concerning which he was perfectly competent to make such an extraordinary contract for its repurchase. The five thousand shares transferred for voting purposes only were made up of certificates in various names, in which names they continued to be held, the Pennsylvania Company never claiming ownership in them, but holding them only in a voting trust. Among these latter certificates were the eight certificates of one hundred shares each in the name of H. S. McCcomb, trustee, which, it is claimed, were held McComb in trust for Snyder. The claim of a trust by in McComb for Snyder, of course, is not new in this proceeding, it having been raised in the Boston case. The new matter presented does not tend in any way to establish that. It is only sought to make out a breach of that alleged trust, or a profit made by the trustee in his use of the subject of the trust. But it appears by the evidence of the complainants' own witnesses that nothing more was done with any of the certificates held by McComb in trust, than temporarily to place them out of his possession in the

hands of a railroad company with which he, as President of the Southern Railroad Association, was seeking to effect arrangements for the best interests of all stockholders. It is given in evidence also by the plaintiffs' witnesses (Ans. 22, fol. 100) that the estate of H. S. McComb has long since received back from the Pennsylvania Company the trustee stock to be held for those who may be entitled to it.

Two serious objections occur to the revival of the proceedings on any such new evidence:

1. A bill like this having for its object the opening of a judgment or review of a cause, must be brought in the court where the former judgment was given or the former cause determined. This the complainants have not done. They have deliberately ignored the jurisdiction of the Massachusetts court having control of the former judgment, and have invoked a new jurisdiction having no authority to consider that judgment in any other way than that of recognizing its binding force by way of estoppel on the complainants.

The discovery of new evidence does not affect a former adjudication.

Kilheffer v. *Herr*, 17 *Serg. & Rawle*, 319.

2. The new matter discovered is wholly without value as strengthening or tending to strengthen the equities of the complainants or those of their decedent.

McComb's acts in relation to the stock have no bearing whatever upon the issue between him and Snyder as to the quality of their respective interests in it. It was the question of the quality or character of those interests that was brought out and considered in the Massachusetts suit, and the evidence upon that question was exhaustive. The judgment in McComb's favor was only entered after a thorough

sifting of the evidence of Snyder's claims upon the stock. The Court held that he had no claim that he could enforce, and this could not have been affected by the fact that the stock had been placed under a voting trust with the Pennsylvania Company. It is safe to say that if the complainants had not been tempted to speculate on the chance that they could establish by the evidence of the Pennsylvania alliance that the stock was worth $125 per share, leaving quite a margin over Josiah Bardwell's debts to McComb, for which it was collateral, they would have been content to rest on the Massachusetts judgment as their decedent had done (see Mr. Frink's testimony, fol. 165).

It is submitted, therefore, that this new matter is not of a character to move a court in a new jurisdiction to reopen a controversy once settled upon practically the same facts by an unreversed judgment of another court.

The rule as to the conclusiveness of former judgments between the same parties as first stated in the Duchess of Kingston's case, "A judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter directly in question in another court," is applicable to this case.

This rule is so well settled that the only value of citing cases is to illustrate the applications of it.

The same parties who were litigants in the Massachusetts case are represented here. Although the forms of the two proceedings are not the same, the evidence upon which the complainants base the alleged ri hts of their decedent is the same, and they sue for the same thing for which he sued—the recovery of a sum of money which he claimed was represented by certain stock issued to McComb as trustee. Except as to McComb's dealings with that stock, the complainants introduce neither evidence nor wit-

nesses not previously before the Massachusetts court upon the transaction involved. The witnesses Cross, Marsh and Mulliken were all witnesses on the former trial and testified upon the same points (fols. 57, 223, 224, 229), and all the exhibits in the case relating to the transaction between McComb, Bardwell and Snyder, and the only testimony of either of the original parties appearing in the record of this case, are taken bodily from the Massachusetts record. Every fact bearing upon Snyder's rights, as against McComb, was brought out in that case; in this case, not even has the attempt been made to prove any additional fact tending to support Snyder's claim.

"Where a former verdict and judgment have been given upon the same claim, in a personal action, between the same parties, upon the merits, it is a good bar to a second action for that claim. *And it is by no means necessary that the form of action should be the same in each case, if the merits of the whole claim have been substantially tried in the first action* * * * What is meant by the same cause of action is, *where the same evidence* will support both actions, although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action."

Lawrence vs. *Vernon*, 3 *Sumner*, 22.

The criterion by which to decide whether two suits are for the same cause of action is, whether the evidence properly admissible in one will support the other.

Steam Packet Co. v. *Bradley*, 5 *Cranch C. Ct.*, 393.

"That a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided

therein, *and that was essential to the decision made*, is a doctrine too familiar to need citation of authorities in its support."

Block vs. *Commissioners*, 99 *U. S.*, 686, 693.

An adjudication upon the same subject-matter by a State Court is conclusive in Courts of the United States.

Ingraham vs. *Dawson*, 20 *How.*, 486.

The rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties is that when a judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding that particular matter, it will be considered as having settled that matter as to all future actions between the parties.

Packet Co. vs. *Sickles*, 5 *Wallace*, 580, 592.

After trial of issues at law on questions of land title and affirmance by the Supreme Court, the unsuccessful party cannot maintain a bill upon the equity side of the Court, setting forth the same titles which were involved in the suit at law and praying relief. He cannot appeal from the judgment of the Circuit and Supreme Courts to a Court of Chancery, upon the merits of the legal titles involved in the controversy.

Ballance vs. *Forsyth*, 24 *How.*, 183.

Where A during the pendency of an action of assumpsit, brought by C against A and B, filed his bill

in chancery against B and C for a discovery, alleging that he had agreed with B to pay the debt for which the action was brought, and that B had paid it; and the Court found these facts not true and dismissed the bill, after which A, on the trial of such action, offered testimony to prove the same facts which he had alleged in the bill; on the objection of C, supported by the record of the chancery suit, it was held that the testimony offered was inadmissible, the decree being founded upon and conclusive as to those facts.

Coit vs. *Tracy*, 8 *Conn.*, 268.

Where a claim is submitted to a jury and disallowed by them, a verdict and judgment thereon are a conclusive bar to a second action for the same cause. So when the jury allows only part of the demand. So if the action is for part only of an entire and indivisible demand, the verdict and judgment are a conclusive bar to a subsequent suit for another part of the same demand. A claim arising from one entire contract, or from one single tortious act, cannot be divided into distinct demands, and made the subject of distinct demands.

Phillips vs. *Berick*, 16 *John.*, 136.

A former judgment in which the *right* now in controversy was directly decided between the same parties is admissible in evidence and is conclusive, although the *cause of action* in the former suit, and the object to be attained by it, were different.

Betts vs. *Starr*, 5 *Conn.*, 550, 552.

Whatever be the form of action, if the original question appears to have been the same and the same evidence will support both the actions, and judgment be had on the merits, it bars all other actions for the same cause.

Cist vs. *Zeigler*, 16 *Serg. & Rawle*, 282.

A judgment, decree, sentence or order by a Court of competent jurisdiction which settles and determines a contested right or fixes a duty on one of the litigants is conclusive evidence that the right, interest or duty belongs to the party to whom the court adjudged it.

Canaan vs. *Greenwoods Turnpike Co.*, 1 *Conn.*, 1, 7.

In the case of *Price* vs. *Dewey* (6 Sawyer, 493; 11 Fed. Rep., 104) a bill in equity was filed seeking an account of the proceeds of the sale by the firm of Payne & Dewey of real estate, the title to which was alleged to have been obtained from the complainant by fraud. The bill was filed against Dewey as surviving partner. There was a plea in bar filed which set up a former adjudication in an action at law in the State of New York brought by the complainant against Payne & Dewey and the parties charged with conspiracy with them, in which the same facts were alleged *as the ground of action* as are alleged in the bill in the suit, and in which there was a verdict and judgment in favor of Payne & Dewey. It was contended that, the New York action being at law and this a suit in equity, and the relief sought being different, there was no identity between them. *Held*, that—"It makes no difference, if the exact facts have been determined and adjudged, whether it took place in an action at law or a suit in equity. *If the facts were determined* the determination was final. It is *res adjudicata* and conclusive."

Snyder had two courses open to him in Massachusetts. He had long been aware of his rights. He might first have sued in equity for the stock, which he did not seem to want, or at law for the money that he claimed to have invested in it. He sued at law and was defeated; he endeavored then to proceed on the equity side of the Court, and the Court said that

his cause of action did not warrant him in doing so. All his rights were adjudicated upon, after a review of the same evidence bearing upon them that has been produced here, and it is submitted that by the conclusions then reached by the Court, he and his representatives are forever bound.

Third.

The complainants are chargeable with laches.

The doctrine of laches as applied by a court of equity is in its general principles analogous to the statutes of limitation at law.

An examination of the decisions of this Court shows not only that in the absence of special circumstances the equitable bar will be applied by analogy to the statute based upon the lapse of time alone, but that the equitable doctrine of laches does not rest upon this basis alone, for in many cases where the lapse of time has been less than the statutory period, it has been held that under the circumstances the defense of laches on the part of the complaining party should be sustained.

A court of equity will not give relief against conscience or public convenience when a party has slept upon his rights. "Nothing," says Lord Camden (4 Brown Ch. R., 640), "can call forth this Court into activity but conscience, good faith and reasonable diligence; when these are wanting, the Court does nothing." *Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions;* it operates by way of presumption in favor of parties in possession. Long acquiescence and laches by parties out of possession are produc-

tive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor. The party guilty of such laches cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability.

Wagner vs. *Baird*, 7 *How.*, 234, 258.

The same principle had been recognized in *Bowman* vs. *Wathen*, 1 *How.*, 189.

The later decisions are to the same effect.

"The question of acquiescence or delay may often be controlled by the nature of the property, which is the subject of litigation." The doctrine of laches will be applied more rigorously when the property is of a speculative character.

Hayward vs. *National Bank*, 96 *U. S.*, 611.

In *Galliher* vs. *Cadwell*, 145 *U. S.*, 368, the Court, after reviewing the cases, held that laches does not like limitation grow out of the mere passage of time, but it is founded upon the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property or the parties.

In this case additional weight must be given to the defense of laches by reason of the death of all parties to the transaction before the suit.

In *Jenkins* vs. *Pye*, 12 *Pet.*, 240, this Court, in a suit to set aside a deed, said: "Lapse of time and

the death of the parties to the deed, have always been considered in a Court of Chancery entitled to great weight, and almost controlling circumstances, in cases of this kind."

Again, in *Brown* vs. *Buena Vista*, 95 *U. S.*, 157, the reasons influencing courts of equity in establishing this rule are well stated thus: "The law of laches, like the principle of the limitation of actions, was dictated by *experience*, and is founded in a salutary policy. The lapse of time carries with it the memory *and life* of witnesses, the muniments of evidence, and other means of proof. The rule which gives the effect prescribed is necessary to the peace, repose and well-being of society. A departure from it would open an inlet to the evils intended to be excluded."

To the same effect is

Godden vs. *Kimball*, 99 *U. S.*, 201.

In *Richards* vs. *Mackall*, 124 *U. S.*, 183, this Court reversed the judgment on the ground of laches alone.

The same thing was done in the case of *New Albany* vs. *Burke*, 11 *Wall.*, 96.

Where the doctrine of laches is applied by analogy to statutes of limitation, the rule adopted by this Court is to follow the statute of limitations of the State in which the action is brought.

Preston vs. *Preston*, 95 *U. S.*, 200.

The limitation in Delaware which applies to actions for an account is three (3) years. *Revised Code* (*Del.*) 1874, *Ch.* 123, *Sec.* 6.

The doctrine that courts of equity apply the bar by analogy to the statute is recognized in Delaware.

Dodd vs. *Wilson*, 4 *Del. Ch.*, 407.

Rice vs. *Pennypacker*, 5 *Houst.*, 354.

This rule applies equally to cases of trust.

While it is true, as a general rule, that lapse of time is no bar in the case of an express trust, the rule is subject to the qualification that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust.*

Speidel vs. *Henrice*, 120 *U. S.*, 377.

Even where money was recovered, as having been wrongfully withheld, this Court reversed the judgment because interest had been allowed, and held that laches in commencing a suit was a bar to the recovery of interest.

Redfield vs. *Iron Co.*, 110 *U. S.*, 174.

The Boston suit negatived the claim of Snyder, based upon his allegation that he had placed in the hands of McComb $45,000, which was to be invested in Soutern Railroad Association stock. The conclusion of that suit in 1878 disclosed to Snyder that if he had any claim against McComb it must be based upon the so-called trust receipt and pursued in a court of equity. Having been refused the right to amend in the Massachusetts Court, if he desired to test the conclusiveness of the determination, he should have instituted a new suit.

No such remedy was sought by him, although both parties lived some years after the Boston suit was terminated, December 23, 1878.

If Snyder had any claim to press, he must be held to a prompt assertion of it after that time. His course of action points to but one conclusion—that he had abandoned any such claim. It was then four years since McComb, in the correspondence that had passed between him and Leland, Allen & Bates on August 18 and 31, 1874 (Exhibits L and M,

pp. 79, 81), had distinctly repudiated the existence of any absolute right of Snyder to the stock.

The complainant below seeks to avoid the operation of the equitable rule as to laches, by asserting that there was a conversion by McComb concealed from Snyder and only discovered after McComb's death. But the only evidence offered as having been so discovered was the transfer to the Pennsylvania Company of the trustee stock for voting purposes. This fact has no bearing as evidence whether or no McComb held the stock as trustee for Snyder. It does not aid in establishing a trust. It would only be pertinent after the trust was established to the question whether McComb made an improper use of the trust property. Upon the question whether there was a trust there has never been a syllable of new evidence discovered since McComb disclaimed the existence of a trust for Snyder. The effect of this so-called newly discovered evidence is fully discussed elsewhere in this brief.

FOURTH.

McComb, even if a trustee for the complainants' decedent, committed no act, and neglected no duty to his *cestui que trust* in respect to the shares of stock in suit, such as makes his estate liable for their original cost, with interest, or for any other sum of money.

The circumstances under which McComb held this trustee stock must be carefully considered in the light of all the facts and the fair inferences from them, before any rule of law or equity in respect to the duties of a trustee to his *cestui que trust* can be applied to this case.

The real question for answer is, was the conduct of McComb in temporarily transferring the voting power of this trustee stock to the Pennsylvania Company in 1871, a breach of trust in any just sense under the circumstances, and whether it was so or not, in any technical sense, may his estate properly be charged with the large penalty of the cost of the original investment in the stock, without any damage to the complainant being shown as the result of McComb's act.

The character of the act must be tested by the object that McComb had in performing it, and his relation to the association and its shareholders. It is not to be gainsaid that he had in view first and foremost the success of the association.

He was one of the originators of the enterprise, the vice-president on the organization of the corporation, and from 1871 its president (fol. 262). His personal holdings of its stock and of the bonds of its leased and connecting lines were very large, amounting to hundreds of thousands of dollars (fol. 500). He was bound from every motive of self-interest and personal pride to make it a success if that was possible. The attempt had been made to conduct an independent operation of its lines, but physical disasters impaired its profitable working, and costly reconstruction and repairs had exhausted its resources to the detriment of its financial obligations. Could anything be done? One great resource remained. If a successful company could be induced to interest itself in developing its traffic and extending its facilities, the investment might not altogether be lost. McComb, active and courageous, found the way and staked his fortune upon the result. In the Pennsylvania Company and its managers, Thomas A. Scott and J. Edgar Thompson (fols. 114, 116, 117), he procured allies whose co-operation would be of the utmost probable value, if there was value to be found in the co-operation of

anybody. Death has sealed the lips of McComb, Scott and Thompson (fol. 127), but the agreements that they have left upon the record are eloquent as to the laudable and honest motives and the boldness of McComb, the shrewdness of Scott and Thompson, and the fairness of all to the remaining stockholders of the Association. Evidently what McComb was bargaining for was the influence of the Pennsylvania Company for the benefit of the Association, and evidently the managers of that Company did not propose to lend its influence to the Association without acquiring both permanency of voting control during the experimental period and a sufficient interest in the expected profits with a guaranty against loss.

Actual interest, with the guaranty, they acquired by the purchasing of 5,000 shares of McComb's own stock with his agreement to buy it back; control they then obtained by the transfer into a voting trust of 600 other shares to him, together with the 800 shares of the remaining trustee stock and 3,600 shares belonging to six other stockholders of the association (see pages 3 and 4 of this Brief).

Mark how he served their interests by the terms of the declaration of trust given by the Pennsylvania Company:

"The said shares * * * have been transferred "to it by the said Henry S. McComb upon the fol- "lowing trusts and conditions, and for no other "uses, trusts and conditions whatever, namely:

"FIRST.—That all of said shares of capital stock "in each of said companies, in connection with a "like number of shares of each of said stock, owned "by the Pennsylvania Company *shall be used and* "*employed by the said The Pennsylvania Company* "*only for the purpose of enabling it so to manage* "*and control each of said companies as may best* "*conduce to the development and extension of their* "*business upon said lines of railway, or any ex-* "*tensions or connections which may be found ad-* "*vantageous, in order that the same may be made*

" *to yield the best practicable results for the owners*
" *of the capital stock of said companies.*
" SECOND.—Upon this further trust and confidence
" from time to time, as dividends of the profits of
" said companies accrue, to receive the same, and
" without delay pay over and divide the said divi-
" dends equally, one-half to go to the said Henry S.
" McComb aforesaid, or the assigns of his interest
" in said capital stock, or any part of the same."

A further article provided for such further declarations of trust by the company as would enable the owners of the shares so held in trust to avail themselves of their interests without impairing the Company's control (Ex. 3, pp. 49, 50).

Up to this time McComb had been much the largest in interest of the stockholders. Taking his 5,000 shares, the Pennsylvania Company proposed to substitute itself in his place as the influential proprietor. McComb was justified, under the circumstances, in demanding a price that was consistent with his hopes, and he obtained $125 per share, but coupled with an obligation to take back the stock, if so requested, at the end of two years at an advance of thirty per cent. upon the price paid (fol. 120). From that time he stood as the guarantor of the success of the enterprise. If it succeeded, the Pennsylvania Company would hardly call upon him to fulfill his promise, but his great holding would be gone, while his fellow-stockholders would reap the fruits of the venture at no risk to themselves. If it failed, he was liable for the repurchase of his stock at the 30 per cent. advance, meaning to him an onerous penalty for his temerity, while his fellow-stockholders would suffer no loss. He guarded them so that while he risked a fortune they could lose nothing and might gain enormously. To say that all this was but a scheme to sell his stock for his own profit is to say what the whole history of the transaction shows to be untrue. His acts are evidence of the utmost good

faith. He did with this trustee stock, in which he had a large interest, exactly as he did with 600 other shares that he owned absolutely, and exactly as was done by other holders of the stock transferred to the voting trust. The forlorn hope failed. He was called upon to fulfill the appalling covenants into which he had personally entered, and after his death all the stock was returned to his executrix (fol. 104). It is now claimed that he should be punished for his gallant struggle to save this trustee stock by compelling him to pay what it cost, although the struggle failed and the stock has always been worthless; that is, in addition to his own losses he is to be fined the amount of money invested in it, but which never came to his hands, with full interest from the early days of the enterprise. That is neither equity nor good conscience. The whole story, from beginning to end, is one of an actually heart-breaking effort on the part of McComb to save his own immense investment in the property, as well as the smaller investments of others, from destruction. The absolute failure of his plans was due to causes that he was powerless to check. Had he succeeded, his efforts would have resulted equally to the advantage of every other stockholder. As he failed, there is no reason, either in law or morals, for fining his widow and children in the amount of this decree.

The bill alleges that McComb concealed the transaction and that Snyder did not discover it during his lifetime, nor did his representatives until within six months of the filing of the bill, and these allegations have been put in issue by the answer. The only evidence offered by the complainants upon the point is contained in the testimony of Messrs. Frink and Storey. The fact that they did not know of the transactions, as will be perceived on reading their testimony, is utterly valueless in regard to what McComb did or did not do.

Frink, Snyder's administrator, testifies (fols. 164, 165) that he first got his information from Mr. Wilson, his counsel, some time after Snyder's death, but he never had any interest in the subject until after Snyder's death, and although he was Snyder's son-in-law and connected with him in business, he could not recall that Snyder had ever spoken of holding any interest in the Southern Railroad Association. The extent of his knowledge was that Snyder had once sued McComb about "something in connection with Southern railroad stock" (Ans. 31, fol. 169); and he "supposed the suit in Boston had closed the thing up" (Ans. 40, fol. 170). Mr. Frink's proved lack of connection with the subject of the controversy is so plain that his want of knowledge as to McComb's acts is neither surprising nor material.

Mr. Storey was counsel for Snyder in the Massachusetts suit (fol. 711). He says that he did not know of the Pennsylvania agreements until after McComb's death, but he is not shown to have had before that any relation with the affairs of the Southern Railway Association which would entitle him to such information. Therefore, when or how he first learned of the existence of the agreements is not material nor relevant; but it appears that after McComb's death he became a director of the association and then ascertained the facts (fol. 718).

From the time of the making of the agreements, the Pennsylvania Company stood on the record as the owner of 5,000 shares of stock, and as shown in the testimony of William Calhoun, the secretary of the Association, the Company did thereafter actually exercise the control over the Association by means, not of its ownership, but of its voting power (fol. 492, pp. 200, 201). The facts and circumstances of such control were open to the knowledge of any one whose interest in the Association might lead him to take cognizance of it or to make inquiry.

Even if there was secrecy it would have been neither strange nor uncommon in negotiations and arrangements of such character, affecting the relations of two such corporations, when success depends frequently upon the maintenance of an honorable secrecy on both sides. More to the point is it that from McComb's standpoint there was absolutely no reason why he should inform Snyder. He held squarely to the position always that there was nothing in the stock to which Snyder's interest attached; that the stock was practically his own, held under liens whose amount far exceeded its cost or any value that it ever had, and this position he maintained even to the point of defying Snyder and Leland, Allen and Bates to enter upon the litigation that afterwards resulted in his favor. Why then should he have volunteered information to Snyder in regard to stock in which, according to his view, Snyder had no interest, and at a time when Snyder and McComb do not appear to have been in communication on any subject.

The subscription and the issue of the stock under it in the name of H. S. McComb, Trustee, on its face indicated more than a mere deposit of collateral. It gave him all the rights of proprietorship except the right of parting with the title. It gave him the power to vote upon all matters relating to the administration of the association's affairs or to transfer that voting right to others by proxy or other effective method. He did not exceed the powers so given him in his dealings with the Pennsylvania Company. He did not part with the title to the stock, but deposited the certificate for it under the voting trust, having carefully provided that that form of transfer should be only in aid of the beneficial management of the Association, the equitable interests of the owners of the stock being preserved under the express covenant that the Pennsylvania

Company would at all times enable the owners to avail themselves of such interest.

The Pennsylvania Company transaction was, therefore, not a conversion of the trustee stock, nor, in view of the terms requiring that the stock should be repurchased at an enormous advance, was it evidence of the value of the stock, and the Court below has so held in both of the opinions rendered. Accordingly, since there was no conversion, and since no money ever passed into McComb's hands for or in place of the stock, his estate is accountable, if at all, not for money received for Snyder's use, but for the stock itself, and the only decree, if any, to which the complainants could be entitled, would be one not requiring payment of the amount that the stock is said to have cost Snyder in 1869, with interest from that time, but one directing an assignment of the stock, or in default of such assignment, the payment of its value. The Circuit Court, in holding that the amount of the recovery is to be governed by the alleged cost of the stock instead of by what it was worth, violated a thoroughly well established and reasonable principle.

Galigher vs. *Jones*, 129 U. S., 200–202.
Smith vs. *Bolles*, 132 U. S., 130.

It was found in the opinions below, as matter of fact, that the stock of the Southern Railroad Association had long since ceased to have any value (fol. 760), that it never had any ascertained market value, and that the holders of it never received any interest or dividends (fol. 753). Nevertheless, Judge Wales holds McComb accountable for $42,000, with interest from the time of Snyder's arrangement with Bardwell in 1869, because he said McComb had the use of Snyder's money and that it went into his estate; and Mr. Justice Bradley holds that, "in the absence of satisfactory proof of the value which the stock had during the period from 1870 to 1874, when it

could have been advantageously disposed of, and when Snyder tried to dispose of it, but was prevented from so doing by the representations of McComb, *the amount paid upon it*, with interest, is the most equitable and satisfactory award of compensation that can be made." McComb, however, never had the use of Snyder's money that Judge Wales says he did have, nor did it go into his estate. Whatever interest Snyder had in the stock he acquired, not by giving money to McComb, which the latter invested in the stock, but by a transfer by Bardwell to Snyder of Bardwell's interest, in settlement of a debt previously incurred by Bardwell to Snyder, with which McComb had no connection. As for Mr. Justice Bradley's finding that McComb prevented Snyder from disposing of his stock at a time when it could have been disposed of advantageouly, there is no evidence tending to show that Snyder ever wished or ever attempted to dispose of his interest, except to Leland, Allen & Bates, for the purpose of calling McComb to account. While it may be no relief to complainants, if they are entitled to any, to give them a decree for the specific stock, that is not because of any act with which McComb is chargeable, but because Snyder originally chose to accept from Bardwell, in satisfaction of a previous indebtedness, an interest in stock for which there was no general market, and whose value, in spite of many hopes, was lost almost at the outset through the unanticipated difficulties that beset the enterprise. Certainly since 1874 there has been no ground for ascribing to the stock any value or hope of value other than a nominal or insignificant one. McComb received no money for the stock, even from Bardwell; he received only the stock. "In no case will a trustee "be held for more than he receives, if he is in no "fault, and has committed no breach of the trust."

2 Perry on Trusts, Sec. 847.

Finally, reference may be made to an objection made by the complainants on the hearing below to the admission of the record of McComb's testimony on the Boston trial, which has been quoted in the course of this argument.

The rule which regulates the admission of the testimony of a deceased witness given on a former trial between the same parties is very well settled. It is, that where the point in issue was the same as in the second action, the evidence is admissible, as stated in 1 Phillipps on Evidence (Cowen & Hills', and Edwards' Notes), *389. The cases there cited in note 110 establish the position that the former proceeding need not have been identical as to the form of the action, nor indeed must it have been a suit at law or in equity. To quote the language of the annotators, " It is enough that the *point was investigated in a judicial proceeding of any kind.*" Among the illustrations given are proceedings before commissioners to settle title to lands under a statute; before trustees of an absconding debtor; commissioners in insolvency, arbitrators, and many others.

The application of the rule to a particular case can only be tested by ascertaining the underlying principle of the rule. Where the testimony was given under oath, in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admissible after the decease of the witness, in any subsequent suit between the ~~said~~ same parties.

1 Greenleaf on Evidence (15th Ed'n), § 163.

Even if the *subject matter* of the two suits be different, if there is *any fact* directly in issue in both suits the testimony of a witness given to that fact

in the former suit is admissible in the latter suit (*id.*, § 164, note 2).

Applying this to the present case, it is manifest that all the testimony of McComb reproduced in this case bore directly upon the meaning of the trust receipt, the circumstances under which it was given, the conversations and communications of the parties to it respecting the same, and the obligations of McComb to Snyder arising out of it. These are precisely the matters in issue in the present case. Upon all of them McComb was cross-examined by counsel for Snyder. Can there be a better illustration of a case in which the same facts were in issue in the two suits?

It can hardly escape the attention of the Court that while the defendant seeks to throw upon this controversy all the light which can be obtained from the testimony of the parties to the transactions to be inquired about, the complainants seeks to exclude it. The defendant offered McComb's testimony and thereby estopped herself from objecting to Snyder's, some of which she does in fact introduce through the medium of questions of her counsel. The effort to exclude this testimony is another feature that is calculated to cast suspicion upon the complainants' case, as is the variety and uncertainty of the statements of the claim as set forth in the pleadings and complaints in the early days of the controversy and by Mr. Snyder in his lifetime.

The decree should be reversed and the case remanded to the Court below, with a direction to dismiss the bill.

WAYNE MACVEAGH,
GEORGE H. BATES,
FRANCIS S. BANGS,
Of Counsel for the Defendant-Appellant.

April, 1893.

149 U.S. 629

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 215.

ELIZABETH B. McCOMB, Executrix of the Last Will and Testament of Henry S. McComb, deceased,

Appellant,

vs.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, deceased.

TERM No. 216.

GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, deceased,

Appellants,

vs.

ELIZABETH B. McCOMB, Executrix of the Last Will and Testament of Henry S. McComb, deceased.

ARGUMENT FOR SNYDER'S ADMINISTRATORS.

GEORGE GRAY,
WILLIAM G. WILSON,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

ELIZABETH B. MCCOMB, Executrix of the last will and testament of Henry S. McComb, deceased, vs. GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, deceased.	Term No. 215.
GEORGE A. FRINK and ESTHER S. SNYDER, Administrator and Administratrix of C. Brown Snyder, deceased, vs. ELIZABETH B. MCCOMB, Executrix of the last will and testament of Henry S. McComb, deceased.	Term No. 216.

ARGUMENT FOR SNYDER'S ADMINISTRATORS.

These are cross-appeals from a decree of the Circuit Court of the United States for the District of Delaware, in favor of Snyder's Administrators, the original complainants, and are presented upon the same record.

The bill was filed January 30, 1883. It averred a trust in Henry S. McComb, in his lifetime, for the benefit of C. Brown Snyder; that McComb had derived large advantages from the trust, and had converted the trust property to his own use, and that he had never accounted; and prayed an accounting.

The answer admits the existence of a trust, but asserts that Snyder's interest therein was only a contingent one; it denies that McComb derived personal advantage from the trust, or converted the trust property; and it sets up the statutes of limitations in bar of the suit.

The decree awarded the complainant the sum of $42,000 with interest from November 23, 1869, amounting to the further sum of $49,420, making in the aggregate the sum of $91,420. (305–306)

The defendant appeals, claiming the award of any sum to be erroneous. The complainant appeals, claiming that the court below did not adopt the right measure in arriving at the amount to which the complainant was entitled.

STATEMENT.

The Southern Railroad Association was originally a voluntary association, formed by written articles of agreement which bore date June 30, 1868. (52) The capital of the association was fixed by these articles at $1,500,000 with a proviso that it might be increased to $2,000,000, in which case the parties to the agreement or their successors were to take their proportionate parts in such increase.

The articles recite the contributions of the respective parties to the original capital of $1,500,000, (53–54) and close with their subscription for the corresponding amounts. (58) The first three signature are "Henry S. McComb, $415,000. H. S. McComb, Trustee, $60,000. Josiah Bardwell, $100,000."

In January, 1869, this unincorporated association became a corporation under the same name by an act of the legislature of the State of Tennessee (58–61) with the increased capital of $2,000,000. This act recognizes and preserves the rights and interests of the unincorporated association and of the parties to the articles of association.

On January 22, 1869, a written agreement was made between the voluntary association, the subscribers thereto, and the new corporation, by which all the rights and franchises and property of the unincorporated association became vested in the corporation. (61–63) The consideration for the transfer is stated in the agreement to be $1,200,000, which is sixty per cent. upon the capital of $2,000,000. The agreement is signed by H. S. McComb, H. S. McComb, Trustee, Josiah Bardwell, and others. (63)

It is not questioned that the original subscription for $60,000 by H. S. McComb, trustee, was taken by McComb in trust for Josiah Bardwell. The answer admits that Bardwell had furnished, by November 23, 1869, about seventy per cent. upon this subscription. (10)

November 12, 1869, Bardwell wrote to McComb as follows: (86)

"My Dear McComb:

"Will you please acknowledge that you hold in 'The Southern Ass'n,' as trustee, for (the benefit), or rather for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest.

"Yours truly,

"Josiah Bardwell.

"Boston, Nov. 12th, 1869."

McComb answered this, as follows: (77)

"Office of H. S. McComb,
"Wilmington, Del., Nov. 22, 1869.

"Josiah Bardwell, Esq.,
"Care of F. Skinner & Co., Boston.

"Dear Sir: I send this (acknowledgment as trustee) the first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes, in any manner, please return it to me with such instructions to be carried out as you shall see disposed to make.

"Yours truly,

"H. S. McComb.
"M."

The "acknowledgment as trustee" mentioned in this letter of McComb's as accompanying the letter has upon it a memorandum in Bardwell's handwriting—"Rec'd Nov. 23, 1869," and it is alleged in the bill (2) and admitted in the answer (10) that it was delivered upon that day. It is as follows: (277)

"To Whom It May Concern:

"I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conform-

ity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

"H. S. McComb, Trustee."

Thus McComb, who had made the original subscription "H. S. McComb, Trustee, $60,000," (58) being the only original subscription for that amount, acknowledges that he holds the same, as trustee for Snyder, and that seventy per cent. has already been paid thereon.

This original subscription, increased, as we have seen, from $60,000 to $80,000 by the increase of the capital of the enterprise, was represented by eight hundred shares in the stock of the Southern Railroad Association (incorporated) issued in the name of H. S. McComb, Trustee, on October 6, 1870. (29, 63) There is no possible question as to the identity of this stock with the subscription. It was the only trust subscription, and the only stock in the name of McComb, Trustee; and the amount of the subscription, as increased by the increase of the original capital, is precisely the amount of the other,—just as the amount of Bardwell's personal subscription of $100,000, as similarly increased, conforms to the amount of stock—$133,300, or 1333 shares (123)—issued to Bardwell upon his personal subscription.

The Southern Railroad Association took a lease of the railroad property of the Mississippi Central Railroad Company for the term of sixteen years from September 1, 1868. (225) Its line of railroad originally extended from Canton, in Mississippi, to Jackson, in Tennessee. (198) The New Orleans, Jackson and Great Northern Railroad Company had a line of road from New Orleans, Louisiana, to Canton, Mississippi, (242) and McComb was largely interested in the securities of both companies, (204) which connected at Canton so as to form a continuous line, and were subsequently consolidated into one company, as we shall see hereafter. The Pennsylvania Company, under another name, as the Southern Security Company, controlled the Memphis and Charleston line, which intersected that of the Southern Railroad Association at Grand Junction, Tennessee. (200)

November 8, 1871, three written agreements were made between McComb and the Pennsylvania Company. (48-51) These documents evidence the sale by McComb of 14,000 shares in the New Orleans, Jackson and Great Northern Railroad Company, at fifty dollars per share, and 5,000 shares in the Southern Railroad Association, at one hundred and twenty-five dollars per share, to the Penn-

sylvania Company, and the simultaneous transfer by McComb to the Pennsylvania Company of an additional 14,000 shares in the first-named company and 5,000 shares in the Association in such manner as to secure to the Pennsylvania Company the management and control of the second 14,000 and 5,000. The second 5,000 shares in the association embraced the eight hundred shares standing in the name of McComb, as Trustee, which were transferred by endorsement on the certificates standing in his name, in the following form: (29–31)

"For value received, I, H. S. McComb, Trustee, do hereby sell, assign and transfer to the Pennsylvania Company within 100 shares of the capital stock of the Southern Railroad Association for $100 each, standing in name on the books of the company and represented by within certificate, and do hereby *irrevocably* constitute and appoint attorney to execute a surrender and cancellation of the within certificate, and also to do all things requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary or be required by the regulations of the said company in that behalf, with full power of substitution in the premises. Dated this day of , 18 .

"H. S. McComb, Trustee."

There is no evidence whatever to indicate that this transaction ever came to the knowledge of Snyder. On the contrary the subsequent correspondence and interviews between Snyder and McComb clearly show Snyder's ignorance of it and McComb's purpose to prolong that ignorance. The fact of such ignorance on Snyder's part is confirmed by the testimony of Frink (67–70) and of Storey (288–289). Storey, who had represented Snyder in a suit brought in Massachusetts, which we shall have occasion to discuss in the course of the argument, tells how the matter was first discovered after the death of McComb; and that occurred in December, 1881.

This transaction of November 8, 1871, gave the Pennsylvania Company the controlling interest in the stock of the Southern Railroad Association. (201) Six months later, May 1, 1872, the Southern Railroad Association (McComb, President,) united with its lessor, the Mississippi Central, in a consolidated mortgage to secure $8,000,000 of bonds to mature in 1912; and the proceeds to be applied, $4,629,000 in paying off the existing bonded debt, and $3,371,000 in extending and maintaining the lines. (233–240)

Simultaneously, on May 1, 1872, the New Orleans, Jackson and Great Northern (McComb, President,) made its consolidated mortgage to secure another $8,000,000 of bonds, likewise to mature in 1912; and the proceeds to be applied, $4,500,000 in paying off its existing bonded debt, and $3,500,000 in construction, maintenance and improvement of its lines. (242-255)

July 3, 1874, the two lines were consolidated under acts of the legislatures of Louisiana, Mississippi, Tennessee and Kentucky, and the consolidated company took the name of the New Orleans, St. Louis and Chicago Railroad Company. (203, 272) The Southern Railroad Association retained control of the consolidated lines, and the management remained in the hands of McComb and the directors elected through that control. (203) At the time of this consolidation the value of the stock of the Southern Railroad Association became "merely nominal," and has since remained so. (131)

Meanwhile McComb, who had parted with all control over the trust stock in November, 1871, was pursuing a line of conduct toward Snyder, his *cestui que trust*, which was designed to conceal that fact from Snyder, and to give Snyder to understand that the stock was still in the hands of McComb, as trustee.

At some time late in the year 1872 or early in 1873, at the office of the Southern Railroad Association in New York City, McComb said to Snyder and Charles Marsh that he was prepared to offer them par and interest for their stock, but advised them not to sell, saying that it was worth three or four for one. (88-90)

In October, 1873, Mr. Cutter, of the firm of F. Skinner & Co. wrote to McComb: "Are the interests of F. Skinner & Co. in the Southern Railroad Association on which you advanced 60 M dollars still intact, and are they worth the loan and principal? How does the 60 M of Mr. Snyder's stand affected?" (86) To this inquiry McComb replied, October 27, 1873: "The South'n R. R. Association stands all right & everybody's interest stands upright & square." (86)

The witness Cross testifies (17) that he was present in the year 1874 at an interview between Snyder, Bardwell and McComb, which took place at the Windsor Hotel, in New York City. Snyder asked McComb to perform his agreement in regard to this Southern Railroad Association stock, referring, no doubt, to the agreement subsequently asserted by Snyder in his action against McComb in Massachusetts, that is, that McComb was to take it (the stock) off

Snyder's hands, if required to do so, and McComb replied that Snyder had better keep it, and do as the others were about to do, put in more money; that it was a good thing and was worth two for one. "Mr. Snyder told him that he wished the money, as he desired to foster other interests that were pressing him. Mr. McComb said that he had no money, but he would let him have some notes to the extent of $30,000, and Mr. Snyder replied that he would; if the notes were good he would use them, and would carry the balance for a time; no time was stated, however; Mr. McComb told Mr. Snyder to come down to a meeting that was to be held—as to the time of the meeting I have no recollection—if he would come there he would fix it up with him." (17–18) "Snyder explained to McComb that he was very much in want of money and wanted him to do as he had agreed in regard to the Southern Railroad Association stock, and pressed McComb pretty hard to do so, and McComb wished him to come to the meeting, that was talked over I know, several times." (18)

This arrangement was not carried out, and July 30, 1874, Snyder wrote to McComb, "I have assigned the receipt I hold from you, as trustee, to Leland, Allen & Bates," (117) and August 18, 1874, Leland, Allen & Bates wrote to McComb announcing their receipt from Snyder of McComb's acknowledgment as trustee. (79)

November 9, 1874, Leland, Allen & Bates again wrote to McComb on the subject: "Several times within four or five weeks, Mr. Bardwell has said that you was ready to be relieved of the trust by transferring the stock represented by your receipt. If you will notify us by mail or telegraph, stating when you will next be in New York, we might meet you there for the purpose indicated." (85) McComb replied, November 11, 1874: "I have your favor of the 9th inst. and note contents. I will give due consideration to your suggestion and will arrange appointment for you to meet me in New York in reference to the subject of your letter." (85)

Nothing further came of this, and Leland, Allen & Bates, on April 3, 1875, transferred back to Snyder the interest represented by McComb's trust receipt. (79)

In November, 1875, upon an examination in New York, McComb testified, after being shown the trust receipt, as follows: (185)

"Q. What has become of the original subscription mentioned in this letter?

"A. It is still in my possession or under my control.

"Q. In what shape is it now?

"A. Stock of the company, as it was then.
"Q. In what name does it stand?
"A. H. S. McComb, trustee.
"Q. Has it so stood ever since this paper was written?
"A. Yes, sir; ever since.
"Q. Continuously?
"A. Yes, sir."

Subsequently Snyder brought an action at common law against McComb, in Massachusetts, based on the alleged agreement of McComb to take the stock off Snyder's hands at any time. The action was tried upon the issue of such an express agreement, and the trial did not reveal the transaction by which McComb had parted with the stock to the Pennsylvania Company. On the contrary it was all through assumed that the stock was still in McComb's possession and full control. And the brief of McComb's counsel upon that trial so assumes:

"Wherever stock is taken in the name of person, as trustee, whether actual trust exists or not, Court will regard it as a trust and enforce it as such." "It becomes wholly unnecessary, as it is entirely impracticable, to inquire, consider or determine what anybody's rights may be under the trust declared in this transaction. When, if ever, a bill in equity shall be brought and all parties in interest brought into court, that may be an interesting, as it will be a necessary question. Till then it is enough that the trust created and acted upon for more than six years by all parties clearly negatives any other agreement concerning this original subscription, and necessitates a judgment for the defendant in this suit." (292)

The Massachusetts action accordingly resulted in a judgment for the defendant, and that judgment was satisfied. (106)

Snyder died July 18, 1882, and the complainants became the administrators of his estate. (4, 13)

McComb died December 30, 1881, leaving a will under which the defendant qualified as executrix. (4, 13)

The Pennsylvania Company held the whole 10,000 shares of Southern Railroad Association stock from November, 1871, the time of McComb's sale and transfer, until some time late in 1883, (38) about two years after McComb's death, and nearly a year after the bill was filed in this cause. The certificates held by the Pennsylvania Company were then, for some unexplained reason, turned over to McComb's executrix, the defendant, or to her counsel, with the exception of 733 shares which had formerly stood in the names of

E. D. Jordan and Alanson Tucker. (44) The certificates for the 800 shares of trust stock bore upon their back the irrevocable transfer to the Pennsylvania Company, in the form already stated. (30)

In the spring of 1873 McComb offered Henry Mulliken $25,000 for 174 shares of Southern Railroad Association stock. Mulliken did not accept this offer at the time, and subsequently wrote to accept, but McComb said that the offer was not open, and he had no money. Later in the same year McComb offered Mulliken $17,000 for the same stock, which Mulliken declined. (93)

William Calhoun, who was connected with the Southern Railroad Association from August, 1870, (197) down to 1877, (205) first being employed in investigating and straightening out the accounts, and afterwards becoming secretary and treasurer, (197) bought ten shares in 1874 (203) and paid par for it. (210)

This statement presents the main features of the case. But in view of the large number of documents which are scattered through the proofs without regard to chronological order, it has been deemed conducive to a clearer view of the various events, to arrange a reference to the same in the order of time, as follows :

Chronological Statement of Facts and Documents.

June 30, 1868. (52–58)

Southern Railroad Association (unincorporated) formed by written articles, with capital $1,500,000, and provision for increase to $2,000,000.

July 8, 1868. (111)

Bardwell paid $40,000, to King, treasurer ; being forty per cent. on his personal subscription of $100,000.

1868. (93)

Mulliken bought his stock, which eventually became 174 shares, and paid $10,000 for it.

Jan. 14, 1869. (58–61)

Act incorporating Southern Railroad Association, with a capital of $2,000,000.

Jan. 20, 1869. (113)

Bardwell paid $10,000, being ten per cent. on his personal subscription, due January 10, 1869.

Jan. 21, 1869. (71–73)

Meeting organizing corporation.

Jan. 22, 1869. (61–63)

Agreement vesting property in the corporation.

Feb. 26, 1869. (110)

NEW YORK, Feb. 26, 1869.

37,580 dollars.

Four months after date I promise to pay to the order of H. S. McComb thirty-seven thousand five hundred and eighty dollars at the National Park, value received.

J. BARDWELL.

Endorsed by—

H. S. MCCOMB,

JNO. L. KING, *Treas. Southern R. R. Association.*

The cancellation of stamps is of April 23, 1869.

April 21, 1869. (116)

BOSTON, Ap'l 21st, 1869.

MY DEAR MCCOMB—I rec'd yours this morning, and answered by tel. that I would write you—having been away yesterday to pay the margin on "C. & R. I." I depended on $40,000 wh. was to have been p'd in on a mortgage on or before the 1st of April, wh. has not come in, but wh. I feel sure I shall get next week at latest. I have had a hard 4-weeks sickness, heavy pay'ts, dull trade, &c., &c., and I got behind, but I now feel like myself once more, and shall "plumb my line" in next 10 days, when nothing unforeseen occurring, "Richard will be himself again." Arrange, if you can, for, me for a few days, when I will respond. I will write you to-morrow about the U. P. R. R. meeting. I am not sure whether I shall go into the Glidden plan or not; it will depend somewhat upon what course the stockholders take as to board of directors, &c. You will be glad to know that I have to-day consummated a settlement with the Vassalboro & James Mills Companies; these things have been

on the slate, one 7 years, the other 7 mos. One by one I am bound to resolve my matters so that I can have an hour's breathing spell.

Truly yours,

J. BARDWELL.

April 22, 1869. (75-76)

Bardwell drew, at Boston, three drafts on Strong & Snyder, at New York, in favor of McComb, for $15,000 each.

April 22, 1869. (76)

Received, Boston, April 22, 1869, of J. Bardwell his three drafts of $15,000 each, 30, 40, and 50 days' date, on Strang & Snyder, New York, being in payment for one-fourth interest in 10,000-share transaction in the stock of the Chicago and Rock Island Railroad Co., to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co., of New York, as brokers, for the account of myself and Bardwell.

H. S. McCOMB.

Attached to the foregoing, upon the same paper, is the following, which was put in evidence by defendant's counsel: (76)

The three drafts mentioned in the foregoing receipt were paid by Strang & Snyder and by them charged to my account on their books after the transaction in Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but $42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt, as trustee, dated Nov. 23, 1869.

C. B. SNYDER.

Boston, January 23, 1870.

May 6, 1869. (117)

NEW YORK, 6 May, 1869.

H. S. McCOMB, ESQ., Wilmington, Del.

DEAR SIR—We have your favor of 5th inst. and note contents. Below we give statement of entries to your account this day.

Debits.	Credits.
	Remittance----$44,709.38.

Yours truly,

SMITH, RANDOLPH & CO.

June 29, 1869. (110)

Bardwell's note (of February 26, 1869) for $37,580, matured.

July 28, 1869. (113)

Mr. J. Bardwell to Southern R. R. Association:

Am't assess's due 2 Mar., '69	$6,665 00
148 days' interest to 28 July	191 80
Draft paid July 29	$6,856 80

Southern Railroad Association, lessees of the Mississippi Central Railroad Company.

OFFICE OF THE TREASURER }
NEW YORK, July 28, 1869. }

J. B. BARDWELL, ESQ.

MY DEAR SIR—I have drawn on you for ass't on y'r stock in the Southern R. R. Ass'n, due 2d M'ch last, as per statement enclosed, which draft please honor.

I am, truly yours,
JNO. L. KING, *Treas.*

If McComb is in Boston let me know, as I wish to telegraph him.

July 28, 1869. (114)

Draft of King, Treas., on Bardwell, for $6856.80, as per statement and letter above.

Aug. 2, 1869. (113-114)

Southern Railroad Association, lessees of the Mississippi Central Railroad Company.

OFFICE OF THE TREASURER, }
NEW YORK, Aug't 2d, 1869. }

Rece'ved from Mr. J. Bardwell six thousand six hundred and sixty five dollars, the same being an assessment of five per cent. on his subscription to the capital stock of the Southern R'road Association, this making sixty five per cent. assessed and paid upon the stock of this corporation and due by the call March 2d.

Am't of call	$6,665 00
Int. to 2d Aug	191 80
Am't of d'pt	$6,856 80

JOHN L. KING, *Treas.*

Aug. 2, 1869. (193–194)
[TO SMITH, RANDOLPH & CO.]

MY DEAR FRIENDS: I notice the extra charges for money, for about 19 days on my Reading acc't amounts to $7,312.08 besides $3,978.96 for int. Pretty severe—I had thought those charges included the interest and were not as the acc't shows, over it. In future acc'ts I must have this money business arranged before ordering purchases.

Please give me at Boston, care of F. Skinner & Co., the amount I remitted on acc't of J. Bardwell, to credit of the special Rock Island acc't.

If convenient, I propose giving Mr. Bardwell a d'ft on you for that precise amount, about Wednesday or Thursday of this week.

Keep me advised hereafter at Boston, care of F. Skinner & Co., daily prices of Rock Island and Michigan Southern. I have no other stocks. I don't care to know prices of any others now. When will Mr. Randolph return?

Meanwhile I am, Truly, &c., H. S. MCCOMB.

AUG. 2, 1869.

We leave for Boston to-day. H. S. MCC.

Aug. 3, 1869. (132)
McComb was in Boston.

Aug. 4, 1869. (119)
McComb gave Bardwell draft on Smith, Randolph & Co. for $44,709.

Aug. 6, 1869. (118)
McComb gave Bardwell check on Bank of North America for $2500.

Sept. 15, 1869. (118)

My Dear Friend Bardwell:

I had sent the note for our joint canal int. before geting your despatch yesterday morning, and suppose it reached you all right and in season.

I shall not go to Boston this week. I have had no notice of a meeting of trustees, and unless the people are ready to act I can see no good reason for losing the time necessary for such a trip. I am going ahead with my suit *vs.* Credit M. & sundry individuals, and mean no delay short of a settlement.

The net of your account is	$36,719 80
From which deduct payment of	2,500 00
Leaving due you and subject to call	$34,219 89

Shall I pay your trustee call S. R. R. A. due the 20th inst.?

Ever yours, H. S. McComb,

Sept. 15, 1869.

Josiah Bardwell, Esq.

Sept. 15, 1869. (194–196)

Bardwell made five drafts upon McComb, maturing Feb. 18, 1870, for $6,641.56 each; making an aggregate of $33,207.80—including interest to maturity.

Sept. 17, 1869. (196)

Boston, Sept. 17, 1869

My Dear Friend McComb: I have yours (of 15th) without date advising balance, etc., due. Now if it suits your convenience and pleasure, it will be agreeable to me and to parties in interest, to send me your acceptances, five months, as per enclosed memorandum, which I have added interest at the rate of seven per cent, from Sept. 15: with these I will settle with Snyder and parties in interest. When I see you, I will tell you how I have settled with S. and others, that you may agree with me that it is fair and right. I will enclose the memo. in a separate envelope, and you may send me the a'c if it so suits you in a personal envelope to me. I fear I shall not go to New York next week as I am very much engaged here. I do wish you could be here next Tuesday, for then I think we can see the end of our mutual interest in the U. P. R., then you and Dr. will tell what you will do, and by your conclusions there will be an end of the matter, for I will not follow it longer. I shall

try and have the Dr. here Tuesday, and then if you and I and he agree the whole matter may be arranged, and to our best interests.

As things now are I am more and more disgusted each day, and feel as though I cared only to be clear out of it. If I can have you and the Dr. Thursday morning for an hour I will agree to clear myself of all further worry on this subject. Please telegraph me on receipt that you will be here on Tuesday and I will not call on you again. I will do nothing about making the drafts for the $34,219.89 until I see or hear from you; but I do think it is of considerable importance that you are here Tuesday.

Yours truly, J. BARDWELL.

Sept. 18, 1869. (112)

Statement of Stock in Name of H. S. McComb, Trustee.

1868.		
July 8.	Am't of 1st ass'm't, 40% on $60,000	$24,000 00
	Interest on do. to 18th Sept., '69—1 year 72 days	2,015 20
1869.		
Jan. 10.	Am't of 2d ass'm't, 10% on $60,000	6,000 00
	Interest on do. to 18th Sept., '69—251 days	292 83
Jan. 2.	(Stock increased to $80,000.)	
	Amt. of 1st ass'm't, 5% on the above	4,000 00
March 2.	Interest on do. to 18th Sept., '69—200 days	155 55
		$36,463 58

Sept. 23, 1869. (118)

McComb gave Bardwell check on National Park Bank for $2000.

Sept. 30, 1869. (123)

BOSTON, Sept. 30, 1869.

MY DEAR MCCOMB—I was at Newburyport yesterday afternoon, and did not get your tel. until this morning. Barry tel. at same time for us not to use $80,000 of his d'fts on Philadelphia, and this draws us short here and in N. O. for the week, and this is not all. I promised Bates to pay $35,000 to-morrow to the U. P. R. R. and again $70,000 which I should have received yesterday in New York from my auction sale, will not be paid until next week, so I could not turn the corner as I ought to have been able to have done with a decent balance. Again Strang advised me that he had the promise

of a $40,000 discount to-day. I sent him $60,000 Washington Mills paper, 70 days to run; he telegraphed at 12 o'clock, bank has broken its promise, so with all I must have another 24 hours to turn.

I do not know the fact, but I think matters will be no worse next week, yet I don't like these times.

Yours always, J. BARDWELL.

Sept. 30, 1869. (112)

Mr. H. S. McComb, Trustee, to Southern R. R. Association:

1869.				
March 2.	Am't ass'm't 5% on $80,000			$4,000 00
	Interest to 30 Sep., 212 d's	$164 88		
	Less ch'g'd 23 Apr.	39 67		
				125 21
11.	Stamps on note			18 50
				$4,143 71

CREDIT.

April 23.	Cash	$5,667 13	
	Interest to 30 Sep., 160 cts.	176 14	
			5,838 27
	To order of H. S. McComb, trust.		$1,694 56
Sept. 20.	Assessment	$4,000 00	
		1,694 56	
		$2,305 44	

Oct. 5, 1869. (124)

(Personal.) BOSTON, Oct. 5, 1869.

MY DEAR FRIEND MCCOMB: I am in trouble, and first to you I write. I left here Saturday night for New York, and returned Sunday; since Sunday I have not closed my eyes. I have been duped and swindled by that man Barry, and it is my own fault that makes the matter so much the worse. I had his honor pledged to me, and were credulous enough to believe. Since Sept. 23 I have paid $260,000 for him. From a sick bed he came to see me in New York Sunday when my worst fears were realized, he owned that he had lost $120,000 in stocks. After talking with him six hours I left, feeling disgusted and tired. I only fear now that

I do not know the worst, he owes me $700,000 and I fear he has misapplied or used some $150,000 of acceptances, he said he had them on hand unused, but I have reason to think otherwise, when he told me that there were no more drafts on us, and that as it stood Friday, so it was and no more. I came home to find his drafts for $350,000 drawn on Saturday, these of mine have gone back. The sufferings of hell cannot compare but unfavorably with mine, but I won't write more.

Yours always, J. BARDWELL.

Don't say a word about this to any one.

Oct. 13, 1869. (123)

PARKER HOUSE, 3 o'clock, Oct. 13, 1869.

MY DEAR MCCOMB: You and the Dr. come to No. 8. I have dinner waiting.

Truly, J. BARDWELL.

I want to back to Franklin St. at 4 o'clock.

J. B.

Nov. 10, 1869. (86)

MY DEAR MCCOMB: Will you please acknowledge that you hold in "the Southern Ass'n" as trustee, for (the benefit), or rather for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest.

Yours truly,

J. BARDWELL.

Boston, Nov. 12th, 1869.

Nov. 18, 1869. (123)

BOSTON, Nov. 18, 1869.

H. S. MCCOMB, ESQ.

DEAR SIR: Enclosed is power of att'y to transfer 1,333 shares of Southern R. R'd Association.

Yours truly, J. BARDWELL, *per* Cutter.

J. B. will probably write you later in the day. E. F. C.

(McComb had loaned $60,000 on the security of the stock a few days before this, *vide* p. 122.)

Nov. 22, 1869. (77)

OFFICE OF H. S. MCCOMB,
WILMINGTON, DEL., Nov. 22, 1869.

JOSIAH BARDWELL, ESQ., Care of F. A. SKINNER & CO., Boston.

DEAR SIR: I send this (acknowledgment as trustee) the first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes, in any manner, please return it to me with such instructions to be carried out as you shall see disposed to make.

Yours truly, H. S. MCCOMB, M.

Nov. 23, 1869. (77)

Memo. in Bardwell's handwriting, "Rec'd Nov. 23, 1869."

TO WHOM IT MAY CONCERN:

I hereby acknowedge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with arrangement made some two months ago between Josiah Bardwell, C. B. Snyder and myself.

H. S. MCCOMB, Trustee.

Nov. or Dec., 1869. (121)

The firm of F. Skinner & Co., of which Bardwell was a member, and which had stood very high in the spring of 1869, did not stand anywhere in the fall of 1869, and failed in November or December, 1869.

April 28, 1870. (110–111)

Rec'v'd from Mr. J. Bardwell, 28th April, 1870, his note 22d March, 5 mos $4,100.00

Rec'v'd from Mr. J. Bardwell, 28th April, 1870, his note 30th March, 5 mos 4,172.58

$8,272.58

For am't of assessments of 5% ea. on the subscription of H. S. McComb, trustee, to the capital stock of the Souther R'road Association, including interest thereon, due 1 & 51 March, 1870.

JOHN L. KING, *Treas.*

Nov. 7, 1871. (64–67)

Ten drafts of the Pennsylvania Co. drawn to order of H. S. McComb, on the Pennsylvania R. R. Co., and accepted by the latter, for the aggregate amount of $1,325,000.

Nov. 8, 1871. (48–51)

MEMORANDUM OF AGREEMENT Between H. S. McComb and the Pennsylvania Company.

WHEREAS, Henry S. McComb, of Wilmington, Delaware, has heretofore sold to the Pennsylvania Company fourteen thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand shares of the capital stock of the Southern Railroad Association, as set forth in a certain memorandum of agreement bearing date the eighth day of November, 1871.

NOW THIS AGREEMENT WITNESSETH, that the said Henry S. McComb, in consideration of the sum of one dollar unto him in hand paid, the receipt whereof is hereby acknowledged, and of other good and valuable considerations, covenants and agrees, that at the end of two years from this date, he will, on sixty days' written notice from the Pennsylvania Company, a corporation created under the laws of the State of Pennsylvania, repurchase the said fourteen shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and the five thousand shares of the capital stock of the Southern Railroad Association, at the price paid for the same by the said Pennsylvania Company, to wit, fifty dollars per share for the stock of the New Orleans, Jackson and Great Northern Railroad Company, and one hundred and twenty-five dollars per share for the capital stock of the Southern Railroad Association, and thirty per cent. advance thereupon, less such dividends as may have been received in the meantime by the said Pennysylvania Company on said stock.

IN WITNESS WHEREOF the said H. S. McComb, and the Pennsylvania Company, parties hereto, have hereunto set their hands and seals this eighth day of November, A. D. 1871.

H. S. MCCOMB. [SEAL]

For the Pennsylvania Company :

THOMAS A. SCOTT, *President.*

Signed, sealed and delivered in the presence of }

JNO. P. GREEN.

WHEREAS, in accordance with certain understandings and agreements, fourteen thousand shares of one hundred dollars each of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand shares of one hundred dollars each of the capital stock of the Southern Railroad Association, have been transferred by Henry S. McComb, of Wilmington, in the State of Delaware, unto the Pennsylvania Company, a corporation created by and existing under the laws of the State of Pennsylvania ;

AND WHEREAS, said shares of capital stock have been transferred to and received by the said Pennsylvania Company upon certain trusts and conditions, the which it is intended by this writing to express and declare ;

NOW, THEREFORE, the said The Pennsylvania Company does hereby acknowledge, testify and declare,

That the said fourteen thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand shares of the capital stock of the Southern Railroad Association, have been transferred to it by the said Henry S. McComb, upon the following trusts and conditions, and for no other uses, trusts and conditions, namely :

FIRST. That all of said shares of capital stock in each of said companies, in connection with a like number of shares of each of said stock, owned by the Pennsylvania Company, shall be used and employed by the said The Pennsylvania Company only for the purpose of enabling it so to manage and control each of said companies as may best conduce to the development and extension of their business upon said lines of railway, or any extensions which may be found advantageous, in order that the same may be made to yield the best practical results for the owners of the capital stock of said companies.

SECOND. Upon this further trust and confidence from time to time, as dividends of the profits of said companies accrue, to receive the same, and without delay pay over and divide the said dividends equally, one-half to go to the said Henry S. McComb aforesaid, or the assigns of his interest in said capital stock or any part of the same.

THIRD. If said Henry S. McComb shall at any time so request the said The Pennsylvania Company shall execute such declarations or other assurances of the interest of said Henry S. McComb in the said capital stock or any portion of the same, as said party may

request, so as to enable said party to avail himself of the equitable interest by him held therein, yet so as in no manner to impair the management and control of said capital stocks which was intended to be secured by the transfer to which this declaration relates.

IN WITNESS WHEREOF the said The Pennsylvania Company has hereunto affixed its corporate seal, duly attested, the eighth day of November, A. D. 1871.

For the Pennsylvania Company :

[SEAL.] THOMAS A. SCOTT, *President.*

Attest : W. H. BARNES, *Secretary.*

MEMORANDUM OF AGREEMENT, made the eighth day of November, A. D. 1871, by and between Henry S. McComb, of Wilmington, in the State of Delaware, of one part, and the Pennsylvania Company, a corporation created and existing under the laws of the State of Pennsylvania, of the other part.

WHEREAS, the said H. S. McComb has transferred to the said Pennsylvania Company fourteen thousand (14,000) shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and five thousand (5,000) shares of the capital stock of the Southern Railroad Association, upon certain trusts, and the said Pennsylvania Company has become the owner by absolute purchase from said H. S. McComb of a like number of shares respectively, making an aggregate of twenty-eight thousand (28,000) shares of the said New Orleans, Jackson and Great Northern Railroad, and ten thousand (10,000) shares of the Southern Railroad Association, all of one hundred dollars each, being a clear majority of stock of both said corporations.

AND WHEREAS, the said parties or either of them may, from time to time, desire to sell and dispose of portions of their interests in said capital stock of said companies.

NOW THIS AGREEMENT WITNESSETH, that the parties for and in consideration of the sum of one dollar by each of them in hand to the other paid, the receipt whereof is hereby acknowledged, have mutually covenanted and agreed, and by these presents do mutually covenant and agree, each with the other, that if either of said parties shall at any time hereafter desire to dispose of the whole or any portion of the shares of capital stock in the said respective companies by them held, he or they respectively shall, before offering the same to any other party, propose in writing to sell at any time within thirty days from the date of such proposition, the said shares

of said capital stock to the other party, at the following rates and prices, namely: for shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, fifty dollars per share, with interest thereon at ten per cent. per annum, from the date hereof, and for the shares of the Southern Railroad Association, one hundred and twenty-five dollars per share, with the like rate of interest.

Provided, however, that the amount of interest shall be abated by the amount of any dividends which may have been received by the party owning such shares, prior to the date of such sale, and at the expiration of thirty days if the other party shall fail to purchase at the prices above stated, then the party holding said shares shall be at liberty to dispose of the same, subject, however, to the conditions and trusts upon which they are held by the Pennsylvania Company, to such party, at such prices, and on such terms as to the said party may seem proper.

It is ALSO FURTHER AGREED by and between the parties hereto that the authorized capital stock of the New Orleans, Jackson and Great Northern Railroad Company is eight millions of dollars, that the amount issued does not exceed four millions seven hundred and twenty-five thousand dollars, and that no further issue of the same, nor increase of capital stock shall be made without the consent of the parties hereto, and that the authorized capital stock of the Southern Railroad Association is two millions of dollars, all of which has been issued, and the capital stock of said Southern Railroad Association shall not be increased without the like assent.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year aforesaid.

H. S. MCCOMB,
For the Pennsylvania Company.
THOS. A. SCOTT, *President.*

Attest: W. H. BARNES, *Secretary.*

May 1, 1872. (233-240; 242-255)

Consolidated mortgage of the Southern Railroad Association, (H. S. McComb, President,) and the Mississippi Central Railroad Company to Edmund J. Forstall, John Newell and Junius B. Alexander, Trustees, for $8,000,000.

Consolidated mortgage of the New Orleans, Jackson and Great Northern Railroad Company, (H. S. McComb, President,) to Edmund J. Forstall, John Newell and Junius B. Alexander, Trustees, for $8,000,000.

Late in 1872 or early in 1873. (88–90)

Marsh's interview with McComb and Snyder in New York.

Int. 6. Do you remember a conversation which took place between yourself and Mr. McComb in relation to stock in the stock in the Southern Railroad Association, at the office of the Association, in the City of New York, about the year 1873 ?

A. I do.

Int. 7. Who were present on that occasion ?

A. Mr. McComb, Mr. Snyder and myself.

Int. 8. Please state the conversation ?

A. Mr. Snyder and myself walked down from the hotel together to the office of the association, and there was to be a meeting that day of the directors. We arrived there some little time before the meeting. Soon after we arrived Mr. McComb came in and said good morning, passed the time of the day, and says: "Now gentlemen, to-day I am prepared to offer you cost and interest of your stock. I had to guarantee Mr. Snyder that before he would take his at all; but this isn't anything you want to sell, this stock." He considered it worth three or four for one; that was all, I believe.

Cross-Int. 28. Then you understood McComb to offer you about sixty and interest for what he said was worth three or four hundred ?

A. The stock was a hundred, and he offered par and interest. I think this is what it was.

Cross-Int. 29. Then you were mistaken in saying he offered cost and interest ?

A. Yes; it was par and interest.

Spring of 1873. (93)

McComb offered Mulliken $25,000 for 174 shares of the stock.

My name is Henry Mulliken. I reside in Milton, Massachusetts. My age 52. Am not engaged in any business. In 1868 I acquired an interest in the Southern Railroad Association for $10,000, which represented eventually 174 shares of the stock of that corporation. I knew Henry S. McComb in his lifetime. In the spring of 1873 I had a conversation with him in relation to the value of those shares, the only part of which conversation I now recollect is that he offered to pay me $25,000 for my said interest. I did not give him any definite answer at the time, but within a few days agreed by

letter to accept that amount for my stock. I received no answer to that letter, but within two or three months saw Col. McComb, who told me that he had recently received my letter, but that his offer was not open ; he had no money, and did not care to take the stock.

Autumn of 1873. (93)

McComb offered Mulliken $17,000 for 174 shares of the stock.

(Continuation of Mulliken's testimony) : In the autumn of the same year I had another conversation with Col. McComb, in which he offered me $17,000 for my said interest, which I declined.

Oct. 25, 1873. (86)

BOSTON, October 25, 1873.

H. S. MCCOMB, ESQ.

DEAR SIR : Yours of the 21st was duly rec'd. Happy to have served you, and you will command me when I can be of use to you. Mr. Bardwell is quite well, and although financial matters are rather mixed here, he appears to keep his usual good spirits. Are the interests of F. S. & C. in the Southern R. R'd Association, on which you advanced 60 M dollars, still intact, and are they worth the loan and principal ? How does the 60 M of Mr. Snyder's stand affected ?

Yours truly, EDMUND F. CUTTER.

Oct. 27, 1873. (86)

WILMINGTON, DEL. October 27, 1873.

E. F. CUTTER, ESQ. Boston, Mass.

DEAR SIR : The South'n R. R. Association stands all right, & everybody's interest stands uprfght & square.

Yours truly, H. S. MCCOMB, *Pres.*

Some time in 1874. (203, 210):

Calhoun bought stock of the Southern R. R. Association and paid par for it.

Feb. 21, 1874. (194)

WIL'N, Feb. 21, 1874.

E. F. CUTTER of F. Skinner & Co. 91 State St. Boston.

If Jordan comes, have him bring Marsh's resignation as director, so that we can reinstate him for the meeting, and re-elect Marsh

when we return. Or else, if Jordan cannot come, and Snyder does, have Marsh resign, and elect Snyder for business on the road, and reinstate Marsh when we get back. Important that he comes thus qualified.

H. S. McComb, *Pres.*

June 3, 1874. (127)

Boston, June 3, 1874.

My Dear McComb: I expected to hear from you this morning on the Snyder matter. I enclose memo. of agreement, S. R. R. Ass'n, this will show the understanding as it is.

Mr. Snyder needs 30,000 to 35,000 in some way to help him out, and if he gets in bonds or otherwise, that which will help him over for 60 or 90 days, his interest as well as mine will be served; as I may learn from you so shall I go to New York to-morrow or Friday, or not.

Please let me learn from you, if you understand the enclosed as I do, and if so, help me to relieve Snyder, as we talked when I was in New York.

Yours truly, J. Bardwell.

June 3, 1874. (83-84)

(Confidential.) Boston, June 3, 1874.

H. S. McComb, Esq.

My Dear Sir: At the request of our friend Mr. Bardwell, I send you the enclosed. This gives me the opportunity to tell you in confidence the state of the case. I have unexpectedly been called on to pay $40,000, a debt of F. Skinner & Co. and myself, which I supposed was paid long since. Not owing anything, my means are all invested in a way that I cannot reach them at present. I can get along with $30,000. What I want is for you to let me have in same way the above amount ($30,000), so that I can use it at once, and then you can reimburse yourself from the sale of consolidated bonds when they are issued. If you can do this you will render a great favor to Mr. B. and myself, and I will be under obligations to you. Please let me hear from you.

Yours truly, C. B. Snyder.

June 15, 1874. (77-78)

OFFICE OF H. S. MCCOMB,
WILMINGTON, DEL., June 15th, 1874.

C. B. SNYDER, ESQ., care Mr. Josiah Bardwell, Boston.

DEAR SIR: I have your letter, with Mr. Bardwell's and the memo. given by me to you, through Mr. Bardwell; but I do not know how I can help you.

I will do anything I can consistenly with the obligations that are already on me, and hope to be able, at the meeting on Monday next, at New York, to suggest something that will relieve you, and not hurt me. You can depend upon my doing everything I can reasonably be expected to do in the matter.

Yours truly, H. S. MCCOMB.

June, 1874. (17-19, 24)

Interview of Snyder and Bardwell with McComb in New York, as testified by Cross.

Q. 6. Where did that interview take place?

A. At the Windsor Hotel, in one of the parlors on the first floor.

Q. 8. Who was present?

A. Mr. Snyder, Mr. J. Bardwell, Mr. McComb and myself.

Q. 9. What took place there?

A. There was a variety of conversation at the start in regard to the weather and the magnificence of the Windsor Hotel. Finally Mr. Bardwell excused himself to go and see a friend in the hotel. After Mr. Bardwell had left the parlor Mr. Snyder asked Mr. McComb to perform his agreement in regard to Southern Railroad Association stock. Mr. McComb replied to Mr. Snyder that he had better keep it and do as the other gentlemen were about to do, put in some more money; that it was a good thing and was worth two for one. Mr. Snyder told him that he wished the money, as he desired to foster other interests that were pressing him. Mr. McComb said that he had no money, but he would let him have some notes to the extent of $30,000, and Mr. Snyder replied that he would. If the notes were good he would use them and would carry the balance for a time. No time was stated, however. Mr. McComb told Mr. Snyder to come down to a meeting that was to be held—as to the time of the meeting I have no recollection—if he would come there he would fix it up with him.

Q. 10. Was Mr. Bardwell present?

A. Not at that time. He came in subsequently, and Mr. McComb suggested that we go to some place of amusement.

Q. 11. Did that end the business?

A. Well, there was some conversation between Snyder and McComb. Snyder explained to McComb that he was very much in want of money and wanted him to do as he had agreed in regard to the Southern Railroad Association stock, and pressed Mr. McComb pretty hard to do so, and Mr. McComb wished him to come to the meeting that was talked over, I know, several times.

It was a summer's eve. (19)

The witness also approved his former testimony, that it was in June, and it was after seven o'clock. (24)

June 24, 1874. (150)

THE WINDSOR, NEW YORK, June 24, 1874.

MY DEAR GEN'L MCCOMB:

I make transcript of memorandum for Snyder's benefit, undertaking to carry out myself the verbal agreement I made with you; 6 notes, $5000 each, Southern R. R. Association 4 mos., and 2 for $5000 each, your endorsement, you to have the $42,000 Snyder's as col. security, and I will send you the satisfactory papers. I think you will send them to my care for Snyder. I did not get to sleep until 5 o'clock this morning, my face troubled me.

Yours truly, J. B.

July 3, 1874. (203, 272)

The two lines of the Mississippi Central Railroad (leased to Southern Railroad Association) and the New Orleans, Jackson and Great Northern Railroad, were consolidated under the acts of the legislatures of Louisiana, Mississippi, Tennessee and Kentucky, and agreements between the companies, the consolidated company taking the name of the New Orleans, St. Louis and Chicago Railroad Company.

After this the Southern Railroad Association did not maintain an independent existence. It was merged in the consolidation; and from that time the value of its stock has been merely nominal. (131)

July 16, 1874. (84)

BOSTON, July 16, 1874.

COL. H. S. MCCOMB.

MY DEAR SIR: Mr. Bardwell stated to me, on his return from N. Y. June 30, that he had made arrangements with you to give me the notes of the S. R. R. Association on account of my stock held by you in trust, and also that the notes would come as soon as you had time to have them made, at 4 month's time. I have waited patiently and. Mr. Bardwell has promised me the notes almost every day. I trust you will do me this favor, because I am really in a tight place and am borrowing the money from day to day, from my friends. I would not ask you for the favor if I could possibly get along without it. Will you help me? Please let me know when you will be in N. Y. or where I can see you next week.

Yours truly, C. B. SNYDER.

July 21, 1874. (80–81)

OFFICE OF H. S. MCCOMB.
WILMINGTON, DEL., July 21, 1874.

C. B. SNYDER, ESQ., care MESSRS. LELAND, ALLEN & BATES, Boston.

DEAR SIR: I have your favor of the 16th.

I would have fixed what I agreed with Mr. Bardwell, to do in your case, had he met me here preparatory to my going South, as he promised and as I expected he would do.

I can send you the $30,000 Southern R. R. Ass'n paper, and will do it if you will return me the paper I signed, giving you so much of the benefits of the stock which was in my name as trustee for Mr. Bardwell, and which I held, by agreement from him, as collateral for advances made to him and F. S. Skinner & Co. which advances more than cover all this stock.

Notwithstanding this, however, I agreed with Mr. Bardwell to give him this paper to help you out; am willing now, as I always have been, to do whatever I can to help him out of his dilemmas.

I do not think that I ought to have been asked to do this much; but, still, I agreed to do it, and I am ready to do it, though it will somewhat inconvenience me, because I have so many things to pay for our concerns, which keeps me beggarly poor all the time. But for my poverty I would have done more for Bardwell's sake.

Yours truly, H. S. MCCOMB.

There is no man living whose prosperity and well being I so much desire as I do that of Josiah Bardwell, of Beverly and Boston, though of all this you need say nothing to him about.

H. S. McC.

July 28, 1874. (84)

BOSTON, July 28, 1874.

COL. H. S. MCCOMB.

DEAR SIR: Yours of the 21st came duly to hand, and I have communicated the contents to Mr. Bardwell. F. Skinner & Co. never had any interest in the money you receipted to me for as trustee, neither had Mr. Bardwell, except that I agreed to share the profits of the transaction with him after receiving the principal and interest at 8 per cent. per annum, and it was as much help to him as myself that I asked you for an advance. I cannot entertain your offer for a moment, but I will assign my interest to parties who will take what they are entitled to, no more—no less.

Yours respectfully, C. B. SNYDER.

July 30, 1874. (117)

BOSTON, July 30th, 1874.

COL. H. S. MCCOMB.

DEAR SIR: For a consideration, I have assigned the receipt I hold from you as trustee, to Leland, Allen & Bates. I was sorry to be obliged to do this, as it will affect your friend Bardwell's interest in the contemplated profits, but, as I was obliged to do something to raise money, I done the best I could.

Yours respectfully, C. B. SNYDER.

July 30, 1874. (78)

Assignment by Snyder to Leland, Allen & Bates, of his right and interest under trust receipt.

Aug. 18, 1874. (79)

BOSTON, Aug. 18, 1874.

COL. H. S. MCCOMB.

DEAR SIR: We have recently made financial transactions with Mr. C. B. Snyder, and among the securities received from him we have your acknowledgment as trustee that you hold an original sub-

scription for acc't of C. B. Snyder, trustee, for sixty thousand dollars in the Southern Railroad Association, upon which seventy per cent. (according to the wording of the acknowledgment, say $42,000) has been paid.

It is our wish that the bonds alluded to in the ack. be transferred and delivered to us, and your receipt given up.

It is however proper to say that when Mr. Snyder assigned this acknowledgment to us he remarked that possibly you might prefer (in order to benefit a third party) to return the money (42,000 dollars and interest at eight % per annum) instead of turning over the bonds, and desired us to give you that option.

Will you be so kind as to inform us by return mail of your wishes in the matter.

We understand that Mr. Snyder informed you some days ago of the assignment to us.

Yours resp. LELAND, ALLEN & BATES.

Aug. 31, 1874. (81)

OFFICE OF H. S. MCCOMB,
WILMINGTON, Del., Aug. 31, 1874.

MESSRS. LELAND, ALLEN & BATES, Boston, Mass.

DEAR SIRS: Your letter of the 18th received in my absence. Mr. Snyder's interest in the stock standing in my name in the Southern Railroad Association, as trustee, is only a contingent interest. This stock was held by me as security for advances made to a third party, before I heard of Mr. Snyder in connection therewith; and it is, therefore, dependent upon the satisfaction of the prior lien thereon.

Neither Mr. Snyder nor any other person either paid or authorized me to pay any calls for allotments of bonds sold to shareholders under and by virtue of the authority of the shareholders in a duly called meeting, at which both Mr. Snyder and Mr. Bardwell were present. There are, therefore, no bonds connected with or belonging to this stock.

Having now no money to invest, I am not at present a purchaser of this or any other stock, which I regret.

Yours truly, H. S. MCCOMB.

Sept. 19, 1874. (85)

BOSTON, Sept. 19, 1874.

COL. H. S. MCCOMB.

SIR: Your letter of Aug. 31st came to hand four or five days ago. We examined the receipt you gave as trustee before it was transferred to us, and both before and since that time have investigated the circumstances and conditions of the trust, and feel entirely certain that no third party has any claim or interest in the property. We have only to renew the request made in our letter of Aug. 18th and add that on the 1st of October we shall, unless previously settled, place the matter in the hands of our legal advisers.

Yours truly, LELAND, ALLEN & BATES.

Sept. 21, 1874. (81-82)

OFFICE OF H. S. MCCOMB,
WILMINGTON, DEL., Sept. 21, 1874.

MESSRS. LELAND, ALLEN & BATES, Boston.

DEAR SIRS: I have no reply to make to your letter other than that already made.

You are at liberty to take any steps that your judgment may dictate in the matter.

Yours truly, H. S. MCCOMB.

Nov. 1, 1874. (257)

First default on consolidated mortgage bonds of Southern Railroad Association and Mississippi CentrelRailroad Co.

Nov. 9, 1874. (85)

BOSTON, Nov. 9, 1874.

COL. H. S. MCCOMB.

DEAR SIR: We should be very glad to have trusteeship in the So. R. R'd. Assoc., concerning which we have heretofore corresponded, arranged.

Several times within 4 or 5 weeks Mr. Bardwell has said that you was ready to be relieved of the trust by transferring the stock represented by your receipt.

If you will notify us by mail or teleg. stating when you will next be in N. Y'k, we might meet you there for the purpose indicated.

Yours truly, LELAND, ALLEN & BATES.

Nov. 11, 1874. (85)

THE NEW ORLEANS, ST. LOUIS & CHICAGO RAILROAD CO., President's Office.
WILMINGTON, Nov. 11, 1874.

MESSRS. LELAND, ALLEN & BATES, 51 Avon St., Boston.

GENTLEMEN: I have your favor of 9th inst., and note contents.

I will give due consideration to your suggestion, and will arrange appointment for you to meet me in New York in reference to the subject of your letter.

Yours truly, H. S. MCCOMB.

Nov. 20, 1874. (194)

BOSTON, Novem. 20, 1874.

C. B. SNYDER, ESQ.

DEAR SIR: On the 4th August, 1869, we received the sum of $44,709.38 and paid as follows:

June 29, 1869	$37,580 00
Octo. 1, "	2,305 44
Aug. 25, 1870	4,100 00
	$43,985 44

and Mr. Bardwell's note, due Sept. 2d, 1870, for $4,172.58, lays under protest, so far as we know.

The above receipts and payments being on account of your subscription to the Southern R. R'd. Association.

Yours truly, EDW'D F. CUTTER,
Of F. Skinner & Co.

Nov. 27, 1874. (130)

BOSTON, Friday, Nov. 27, 1874.

MY DEAR MCCOMB: Thank God I am up and about again, and I propose to keep so.

I wonder when I can see you, and where, is there nothing this way that requires your attention? The Snyder matter annoys me more than it can you. I should be glad to be relieved, also to put Snyder out of misery.

How about the canal property?

Truly, J. BARDWELL.

Dec. 6, 1874. (131)

BEVERLY, Sunday, Dec. 6, 1874.

MY DEAR MCCOMB: Had you answered Tuesday for the S. R. R. Ass'n meeting, I should have gone to N. York to-morrow. On my own account I do not regret a later day, for I am coming so right in my health I don't want a set-back. I will be in N. York Thursday, nothing preventing. Snyder is anxious that I should go Tuesday, but what is the use.

Truly yours, J. BARDWELL.

April 9, 1875. (79–80)

Leland, Allen & Bates reassigned to Snyder, rights under trust receipt.

June 25, 1875. (180)

Snyder's action in New York begun.

Oct. 26, 1875. (97)

Snyder's action in Massachusetts begun.

Nov. 23, 1875. (185)

McComb's examination in New York action.

Q. (repeated) What has become of the original subscription mentioned in this letter?

A. It is still in my possession or under my control.

Q. In what shape is it now?

A. Stock of the company, as it was then.

Q. In what name does it stand?

A. H. S. McComb, trustee.

Q. Has it stood so ever since this paper was written?

Q. Continuously?

A. Yes, sir.

Q. Who received the money for that subscription?

A. For which subscription?

Q. The subscription mentioned in this letter.

A. Who was that subscription made by?

Q. I ask you how that subscription was paid.

A. I presume it was paid by Mr. Bardwell to the company.

* * * * * * *

Q. How did that subscription, then, originally get into your name as trustee?

A. Put so by Bardwell when he made the subscription.

Q. With your consent?

A. No, sir; I was not asked about it.

Q. You subsequently assented to it?

A. Yes, sir; that would indicate that.

Jan. 19, 1876. (180)

Snyder's action in New York discontinued.

March 10, 1876. (203)

The consolidated company, into which the Southern Railroad Association had been merged, went into the hands of a Receiver.

Dec. 22, 1876. (271)

Decree of sale of the railroad property, in foreclosure, in Mississippi.

Dec. 30, 1881. (4, 13)

McComb died.

July 18, 1882. (4, 13)

Snyder died.

Jan. 30, 1883. (6)

Bill filed in this suit.

Late in 1883. (38)

Certificates of the 800 shares of trust stock endorsed over to Pennsylvania Company, delivered by that company to McComb's executrix.

ERROR ASSIGNED.

These appellants, the original complainants, allege the decree below to be erroneous in this: That in and by such decree it was adjudged that the defendant should pay to the complainants the sum of forty-two thousand dollars with interest from the date of the said trust receipt; whereas it appears that on or about November 8, 1871, the date of the conversion by McComb of said trust stock, the said trust stock was worth one hundred and twenty-five dollars per share, and the decree should have adjudged that the defendant should pay to the complainants the value of the stock at that time, with interest from that date.

POINT FIRST. McComb was trustee for Snyder.

Among the subscriptions to the original agreement by which the Southern Railroad Association was formed, was one of "H. S. McComb, Trustee" for $60,000. This was the only subscription in the name of McComb, Trustee, and all the remaining subscriptions were absolute.

McComb personally headed the list with a subscription of $415,000, and Bardwell personally subscribed $100,000, but Bardwell's subscription was really that of F. Skinner & Co., of which firm Bardwell was a member. (135)

There is no question that the subscription of McComb, Trustee, for $60,000, was put in that form at Bardwell's request and for Bardwells benefit. It was admitted by McComb (125) and shown also by independent evidence that the assessments on the stock represented by that subscription were paid by Bardwell, down to November, 1869; there is no pretense that McComb ever paid any part of them.

It will be observed, in Bardwell's correspondence, that as early as April, 1869, his affairs were not going to his entire satisfaction. On April 21 he writes that he had depended on $40,000 which was to have come in; had had a hard four weeks sickness, heavy payments and dull trade, but hoped soon to be himself again. He closes, "One by one I am bound to resolve my matters so that I can have an hour's breathing spell."

September 17, 1869, he says, "As things now are I am more and more disgusted each day, and feel as though I cared only to be clear out of it."

September 30, 1869, Bardwell writes of his financial difficulties, due to his disappointment in not receiving several large sums which he had expected. He had been unable to "turn the corner with a decent balance," and while he thinks matters will be no worse next week, he adds, "I don't like these times."

But matters were decidedly worse during the next week. He begins his letter of October 5, 1869, with the statement that he is in trouble; narrates his discovery that he had been duped and swindled "by that man Barry" to the extent of hundreds of thousands of dollars; expresses his fear that he does not yet know the worst; and closes, "The sufferings of hell cannot compare but unfavorably with mine."

Thus Bardwell's embarassments had been increasing, until at the date of this last letter he was in a state bordering on desperation. His firm of F. Skinner & Co. for whom the subscription for $100,000 in Bardwell's name had been taken (135) was in difficulties, and failed in November or December, 1869 (121).

Meanwhile, however, Bardwell had been keeping up his payments upon the trust subscription to the Southern Railroad Association, so that, as was recited in the trust receipt, seventy per cent. had been paid. And that it had been paid, directly or indirectly with Snyder's money, there can be no doubt, in view of Bardwell's statement and the circumstance that Bardwell had Snyder's money in his hands in amount ample to cover such payments.

As is said in the opinion of Judge BRADLEY, (303) the transaction in the Chicago and Rock Island stock does not affect the case in the least, except as being the occasion through which Snyder's money came into Bardwell's hands. But it does show *that* quite clearly.

On April 22, 1869, Bardwell made three drafts, for $15,000 each, upon Snyder's New York firm of Strang & Snyder, in favor of McComb; and McComb gave Bardwell a receipt for the same as "being in payment for one-fourth interest in 10,000 share transaction in the stock of the Chicago and Rock Island Railroad Co. to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co. of New York, as brokers for the account of myself and Bardwell." May 6, 1869, Smith, Randolph & Co. gave McComb credit for proceeds of this remittance, $44,709.38. August 2, 1869, McComb wrote that he proposed giving

Bardwell a draft for this precise amount, which he had remitted for Bardwell's account to the credit of the Rock Island transaction, and asked what the amount was. And he evidently was furnished with the figures at once, in answer to his enquiry; for on August 4, 1869, he gave Bardwell a draft on Smith, Randolph & Co. for $44,709.

This returned to *Bardwell* the principal invested in his one-quarter interest in the Rock Island speculation. The profit on the same one-quarter interest amounted to the further sum of $36,719.80, (118) of which Bardwell received $2,500 by McComb's check of August 6, 1869, (118) the bulk of the remainder by Bardwell's drafts dated September 15, 1869, on five months' time with interest added, accepted by McComb, (194–196) and the balance of $2,000 by McComb's check of September 23, 1869. (118)

Now Snyder was not only entitled to the return of the money he had furnished as the whole capital of Bardwell's one-quarter interest, but he was also entitled to some share in the profits of the speculation. We should naturally expect this to be the fact, for the money was furnished by Snyder with the knowledge of the purpose for which it was to be used, and McComb's receipt to Bardwell for the original contribution was evidently turned over by Bardwell to Snyder. (76) And this expectation is confirmed by Bardwell's letter of September 17, 1869, to McComb, in which he says, "With these [acceptances] I will settle with Snyder and parties in interest. When I see you I will tell you how I settled with S. and others, that you may agree with me that it was fair and right. (196)

Therefore, in September, 1869, Bardwell owed Snyder the amount of his original advance, $44,709.38, and some additional sum representing Snyder's share in the profits. And Bardwell had written to McComb, in the letter last cited: "As things now are, I am more and more disgusted each day, and feel as though I only cared to be clear out of it." In this state of disgust and anxiety, which increased upon him from week to week, with financial embarrassments closing about him and his firm of F. Skinner & Co. and threatening the failure which soon followed, and with a large indebtedness to Snyder for Snyder's money which had come into his hands, it was the most natural thing in the world that he should turn over to Snyder this trust subscription in settlement. And when McComb—who had been confidentially advised of Bardwell's difficulties, and who knew that Bardwell had received from him a large amount belonging to Snyder—when McComb was informed by Bardwell's letter of November 12, 1869, that Snyder had two months previ-

ously paid Bardwell the cost of the trust subscription and interest, it excited no surprise and required no further explanation.

On the contrary he complies with Bardwell's request at "the first leisure moment" after the receipt of his letter, and recites in his acknowledgment that it is given in conformity with an arrangement made two months before.

It would seem unimportant to establish by further evidence the fact admitted by Bardwell as the reason for the transfer of the beneficial ownership of the trust subscription, and acquiesced in without question by McComb, that Snyder had paid Bardwell cost and interest for the same. But it does appear affirmatively that the $44,709.38 returned by McComb to Bardwell, August 4, 1869, was turned over to Bardwell's firm of F. Skinner & Co., and was applied (194) first to repaying the amount of Bardwell's note (110) for $37,580 given February 26, 1869, through McComb to the Southern Railroad Association, and maturing June 29, 1869. Another payment of $2,305.44 was made therefrom (194) on October 1, 1869, being the balance due upon the trust subscription of the assessment of September 20, 1869. (112) And from the same fund was paid (194) Bardwell's note maturing August 25, 1870, for $4,100, which was given for the assessment of March 1, 1870, of five per cent. upon the trust subscription (increased to $80,000) and the interest on the same. (110-111)

In the light of all these facts it is obvious that the simple and natural meaning of the language of the trust receipt is the true meaning. It is direct, unconditional and unqualified. It is in conformity with Bardwell's request, and in conformity with the fact which that request recited, and as to which all three parties were agreed. It is inconsistent with any other construction. It is intended as a simple, absolute declaration of trust, in favor of Snyder, made necessary because Snyder had bought the beneficial interest from Bardwell and had paid Bardwell in full for it, and because, inasmuch as Bardwell was only a *cestui que trust* and the legal title was in McComb as trustee, the only way to make the transfer effectual was for McComb to declare that he held "as trustee for C. B. Snyder."

Read in this light, the three papers plainly and convincingly tell their own story. It will be convenient to repeat them here.

November 12, 1869, Bardwell writes: "My dear McComb: Will you please acknowledge that you hold in 'the Southern Ass'n,'

as trustee, for (the benefit) or rather *for C. B. Snyder*, that am't of stock wh. you held as for me, *Mr. Snyder having two months since pd. me its costs and interest.*"

Ten days later McComb replies to Bardwell: "I send this *(acknowledgment as trustee)* the first leisure moment after the receipt of your letter, and if it is not in conformity with *your wishes*, in any manner, please return it to me with such instructions to be carried out as you shall see disposed to make."

And the enclosed "acknowledgment as trustee" received by Bardwell in due course of the mail, upon the following day, and by him turned over to Snyder as the evidence of Snyder's equitable title, is in these words: "To whom it may concern: I hereby acknowledge to hold in the Southern Railroad Association, *as trustee for C. B. Snyder*, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is *in conformity with an arrangement made some two months ago* between Josiah Bardwell, C. B. Snyder and myself. H. S. McComb, trustee."

When McComb was asked on his examination in New York what this last sentence meant, he answered that all the "*arrangement*" he knew of was "merely a remark that Mr. Snyder made in my presence one day, that he wanted Bardwell to fix that Southern Railroad Association." (186)

We have then this declaration of trust, accepted by all parties as precisely what all parties wished it to be, in plain and simple language, and free from any possible ambiguity. It expresses an absolute trust for Snyder; just what Bardwell's duty required him to procure, and Snyder's protection demanded, when Snyder had paid Bardwell in full for the equitable ownership of the subscription; and just what McComb's duty as trustee required him to give to the new *cestui que trust* under the same circumstances. That the transfer was, at the time, a matter of absolute indifference to McComb, personally, is apparent from his offer to comply with any instructions which Bardwell might choose to give, in case Bardwell found the wording of the acknowledgment unsatisfactory, and is apparent from his statement that all that he knew about the arrangement was that he heard Snyder ask Bardwell "to fix that Southern Railroad Association."

For a long time after the making of this declaration of trust for Snyder, everything in McComb's conduct and correspondence recognized his trust for Snyder as fully established and absolute. McComb

talked of the interest and the stock represented by this subscription, as Snyder's, and gave not the faintest hint of any idea other than that of Snyder's complete and entire ownership.

Late in 1872 or early in 1873, and therefore about a year after McComb had secretly disposed of this very stock to the Pennsylvania Company, Snyder, McComb and Marsh were together in the office of the Southern Railroad Association in New York City; there was to be a meeting that day, of the directors. McComb said: "Now, gentlemen, to-day I am prepared to offer you cost and interest of your stock; I had to guarantee Mr. Snyder that before he would take his at all, but this isn't anything that you want to sell, this stock." (88) As Snyder had no interest in the association or its stock other than that which he had derived through Bardwell under McComb's acknowledgment as trustee, the statement "I had to guarantee Mr. Snyder that before he would take *his* at all" must necessarily have referred to the stock held by McComb in trust for Snyder.

In June, 1874, Bardwell, Snyder, McComb and Cross were together at the Windsor Hotel in New York City. "Mr. Snyder asked Mr. McComb to perform his agreement in regard to the Southern Railroad Association stock; McComb replied to Mr. Snyder that *he had better keep it* and do as the other gentlemen were about to do,—put in some more money; that it was a good thing, and was worth two for one. Mr. Snyder told him that he wished the money, as he desired to foster *other interests* that were pressing him; McComb said that he had no money, but he would let him some notes to the extent of $30,000, and Mr. Snyder replied that he would; if the notes were good he would use them, and *would carry the balance for a time.*" (17)

This latter conversation had been preceded by Bardwell's letter of June 3, 1874, to McComb (127), in which he stated Snyder's need for $30,000 or $35,000, and asks McComb's help "to relieve Snyder, as we talked when I was in New York." He enclosed "memo. of agreement, S. R. R. Ass'n,"—presumably a copy of the trust receipt, —and says, "this will show the understanding as it is." Snyder wrote the same day (83–84) upon the same subject. And McComb answered Snyder: "I have your letter, with Mr. Bardwell's, and *the memo. given by me to you through Mr. Bardwell;* but I do not know how I can help you." (77–78) On June 24, 1874, Bardwell, at the Windsor Hotel, made for McComb a written memorandum of the verbal arrangement he had made with McComb for Snyder's

help: "6 notes, $5,000 each, Southern R. R. Association, 4 mos. and 2 for $5,000 each, your endorsement, *you to have the $42,000 Snyder's as col. security.*" (130)

This last expression, coupled with the fact that the terms of the trust receipt had been a few days before brought to McComb's attention in this same connection by sending him a copy of it, was a manifest reference to the trust stock; and this memorandum of Bardwell's shows that McComb had orally agreed with Bardwell to advance Snyder notes for $40,000 on the security of the stock which he held—or was believed to still hold—in trust for Snyder. $42,000 was seventy per cent. on the "original subscription of sixty thousand dollars, on which, as the trust receipt read," seventy per cent. has been paid. Bardwell's meaning in making use of the expression "the $42,000 Snyder's" could not therefore have been misunderstood, even though Bardwell apparently overlooked for the moment, if he knew it, the fact that Snyder had paid $4,000 more, after the trust receipt was given, and the fact that by the increase of the capital and issue of the capital, the subscription had ripened into the eight hundred shares of stock which stood in the name of McComb, trustee.

If, then, there had really been any question as to the absolute character of the trust; if there had been any doubt of Snyder's full ownership, after he had paid full value to Bardwell; if McComb had a prior claim and lien upon the property which might absorb its whole value; the conduct of McComb must be regarded as utterly inexplicable. To say nothing of the inherent improbability of McComb's giving such a declaration of a trust for Snyder as a *bona fide* purchaser for full value, when it was intended that McComb should himself have such a prior lien as might and actually did, as is now claimed, reduce the value of Snyder's purchase to nothingness,—why was it that McComb in the Marsh interview spoke of Snyder's interest, and advised him to keep it, and said that he had to guarantee Snyder cost and interest, or par and interest, before Snyder would take his at all? Why did he advise Snyder to keep his interest, if Snyder had no interest to keep? How was Snyder guaranteed cost and interest, or par and interest, if the defendant's claim in regard to the nature of the trust has any foundation? Why did not McComb repudiate the idea of any value in Snyder's interest, instead of agreeing with Bardwell to hold it as security for an advance to Snyder of $40,000? Surely such conduct was inconsistent with any *honest* claim on McComb's part, that

Snyder's interest was not truly expressed in the trust receipt, and is very persuasive evidence that the idea of asserting such a claim had not, up to that time, occurred to McComb.

Still more significant was the correspondence, a little earlier, between Cutler, of F. Skinner & Co., and McComb. Cutler wrote, October 25, 1873, "Mr. Bardwell is quite well, and although financial matters are rather mixed here, he appears to keep up his usual good spirits. Are the interests of F. S. & C. in the Southern R. R'd Association, on which you advanced 60 M dollars, still intact, and are they worth the loan and principal? *How does the 60 M of Mr. Snyder's stand affected?*" And McComb replied, two days' later, "The South'n R. R. Association stands all right, and *everybody's interest stands upright and square.*" (86)

The first assertion of any claim that Snyder's right was qualified and not absolute is found in McComb's letter of July 21, 1874; (80–81), and this assertion was immediately contradicted, in the most emphatic manner, by Snyder's answer of July 28. (84)

At this time the Southern Railroad Association had became merged by consolidation, into the New Orleans, St. Louis and Chicago Railroad Company. This consolidation took place July 3, 1874, (203) and left the Southern Railroad Association without any independent existence, and its stock thenceforth practically represented nothing, and had only a nominal value. But we may be sure that McComb and the Pennsylvania Company, holding as they did the control of the Southern Railroad Association and the New Orleans, Jackson and Great Northern Railroad Company, by the union of which the new consolidated company was formed, did not lose their control by the consolidation, and that when the consolidation left only a nominal value in their stock in the two former companies, they found an ample compensation in the securities of the new consolidated company.

It was nearly three years before this that McComb had made the secret sale of his own stock and the secret transfer of the trust stock to the Pennsylvania Company. It does not appear to have been made known to any one. Certainly Snyder was kept in ignorance of it so long as he lived; and McComb's purpose to keep Snyder in ignorance of it is manifest in all the proofs. Even upon the trial of of the Massachusetts suit no whisper of it was allowed to escape; on the contrary, that trial was conducted upon the theory that McComb had all along retained full control of the stock which stood

in his name as trustee; and at his examination in New York in November, 1875, he distinctly and falsely testified (185) that such was the fact.

Now, while Snyder was in easy financial circumstances, and retained his confidence in McComb, it was an easy matter to keep him quiet by assurances that it was all right, and that the stock was worth two or three for one, and that it was something which Snyder ought to hold on to. But Snyder's necessities in the summer of 1874 produced a serious change in the situation. Snyder was in straits for money, having been unexpectedly called upon to pay a debt of $40,000, and having his means all invested in such a way that he could not reach them at the time. (84) Therefore he preferred to realize upon his stock in the Southern Railroad Association. The conversation of June, at the Windsor Hotel, showed that Snyder preferred to close it out, and that, to dissuade him, McComb said he had no money, but would let him have notes for $30,000 upon it.

Whether in this conversation, and in the correspondence which preceded and followed it, McComb really did intend to let Snyder have these notes, we have no means of determining. Certainly he agreed to the arrangement, for he expressed no dissent from the statement of it in Bardwell's memorandum of June 24, written at the Windsor Hotel, (130) and Bardwell, on his return to Boston, on June 30, reported the agreement to Snyder. But it would appear that he had only seemed to assent in order to put Snyder off, in the hope that Snyder would get out of his difficulties and would quiet down again.

But Snyder became more and more urgent, and his letter of July 16, (84) indicated that he could not be put off much longer. McComb could see that he was threatened by the danger that Snyder, who, while in easy circumstances, was content to take McComb's word that all was right, would probably now, under the pressure of financial embarrassment, insist upon a settlement and accounting, which would surely lead to the discovery of McComb's breach of trust by the conversion of the stock for his own personal benefit.

"Necessity is the mother of invention." The situation called for some means by which the impending peril could be averted. The pretext to which McComb resorted was ingenious and for a long time efficacious. It was to assert that he had a prior claim himself upon the trust stock. He writes accordingly that he will let Snyder have the $30,000 of Southern Railroad Association paper if Snyder will

surrender the trust receipt, but adds that he held the stock as security for advances to a greater amount than the value of the stock. "The stock" he says, (81) "which was in my name as trustee for Mr. Bardwell, and which I held, by agreement from him, as collateral for advances made to him and F. Skinner & Co., which advances more than cover all this stock." He adds: "Notwithstanding this, however, I agreed with Mr. Bardwell to give him this paper to help you out; * * * I do not think that I ought to be asked to do this much; but still I agreed to do it, and am ready to do it, though it will somewhat inconvenience me."

Thus, nearly five years after giving the trust receipt, McComb for the first time asserted that he had a prior lien upon the interest and stock represented by it, which more than covered all its value, although he knew all along that Snyder had paid Bardwell for it in full,—and although only one month previously, in talking with Snyder on the same subject, he had told Snyder that Snyder ought not to sell this stock, but keep it, and that it was worth two for one.

The only proofs upon which the defendant relies to substantiate this claim of McComb are found in his testimony given upon the trial of the Massachusetts action. That testimony was introduced under objection, and was clearly inadmissible. It was inadmissible because the issues in that action were radically different from those presented in the present suit. That action was based upon an express agreement of McComb to employ certain moneys of Snyder's *in his hands* in an investment in the stock of the Southern Railroad Association, and to return to Snyder, on demand, that money and interest; (102) and it was defended on the ground that the trust receipt established a trust, and that the trustee was answerable only in equity. (291-292) The evidence of a party given upon a former trial is only admissible after his death upon another trial of the *same issues*. There is then, no principle upon which McComb's former testimony can be available *as evidence in his own favor here*.

But it must not be understood that, in urging and insisting upon this objection to the admissibility of McComb's testimony upon the trial in Massachusetts, we have any apprehension as to the results which must follow from its fullest consideration. It sets forth no definite claim, and gives no definite figures as to the extent of this newly asserted lien for allowances which "more than cover all this stock," in respect to which McComb had been silent from November 22, 1869, when he sent the trust receipt to Bardwell for

Snyder, down to the time of this letter of July 21, 1874, and it contains strong internal evidence of its untruthfulness. But even if it be true, it does not support the defendant's position. We shall lose nothing by the critical examination of this testimony.

McComb was examined in New York in November, 1875, and the record of such examination was offered by the defendant, here, as it was read upon the trial in Massachusetts.

The trust receipt was, upon that examination in New York, produced and shown to McComb. We quote from his testimony:

"Q. What has become of the original subscription mentioned in this letter?

"A. It is still in my possession or under my control.

"Q. In what shape is it now?

"A. Stock of the company, as it was then.

"Q. In whose name does it stand?

"A. H. S. McComb, trustee.

"Q. Has it stood so ever since this paper was written?

"A. Yes, sir; ever since.

"Q. Continuously?

"A. Yes. [This was untrue, because the stock had been transferred and delivered to the Pennsylvania Company, four years before, and was then held by that company and continued to be so held for nearly a year after the present suit was brought, as has been already shown.]

* * * * * * *

"Q. How did that subscription, then, originally get into your name as trustee?

"A. Put so by Bardwell when he made the subscription.

"Q. With your consent?

"A. No, sir; I was not asked about it.

"Q. You subsequently assented to it?

"A. Yes, sir; that would indicate that.

"Q. Well, this letter indicates that you held it as a trustee for C. B. Snyder, does it not?

"A. I think I would rather that the Court should make an interpretation of that. It refers there under an arrangement with Bardwell. You must take the whole thing together. *I had no arrangement about it with Mr. Snyder, at all.*

"Q. *You had no arrangement with Snyder about it?*

"A. *No, sir.*

"Q. *Then what does this sentence mean:* 'This notice is in conformity with the arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself'?

"A. *Merely a remark that Mr. Snyder made in my presence one day, that he wanted Bardwell to fix that Southern Railroad Association. That was the substance of his remark.*

"Q. Where was that remark made?

"A. I think it was in Boston, in Skinner's office.

"Q. Do you remember when?

"A. No, I do not.

"Q. Was it in the year 1869?

"A. I could only suppose.

"Q. Well, what is your supposition?

"A. I presume it was. I suppose it was.

"Q. *That was all the 'arrangement' you know of?*

"A. *Yes, sir.*" (185–186)

McComb also testified, upon this same examination in New York that he remembered no interview between himself and Snyder, upon the subject of Snyder's becoming in any way interested in the Southern Railroad Association. (183)

All this testimony McComb, upon the Massachusetts trial, admitted having given, and was unwilling to admit that there was any discrepancy between it and his oral testimony upon that trial. (153) He therefore adhered to it, and, in fact, made no claim or pretence that it was not true. And yet it is utterly irreconcilable with the claim which the defendant has asserted here, and has undertaken to substantiate by McComb's testimony in Massachusetts.

It would, indeed, be a hopeless task to undertake to reconcile all of McComb's conflicting statements. At the time of the Massachusetts trial, but after the New York examination, Bardwell had died. The salutory restraint which existed at the time of the New York examination had been removed. Bardwell's lips were sealed forever, and McComb was free from any fear of contradiction in his narration of what took place between Bardwell and himself.

In New York McComb had said, as we have just seen, that this trust subscription was put in his name by Bardwell, without McComb's assent; that McComb was not even asked about it, but *subsequently assented.* On the Massachusetts trial he said (109) that in making the subscription for $60,000, he was trustee for Josiah Bardwell, for the benefit of his wife, as Bardwell stated to him "*at*

the time he asked the subscription made." And again he says (136) "The arrangement made at the time was this: It was subscribed for the benefit of his wife, and when the subscription was paid, then it was to be held by me until such time as he could redeem it. That was the understanding when he made the subscription. There was no money paid at that time." But later on he says (150) that he had nothing to do with Mrs. Bardwell, and that he considered it proper to apply the subscription to anything Mr. Bardwell directed.

And as to the alleged agreement that McComb was to hold this subscription as security for Bardwell's indebtedness to him, we find the following statements:—

At the time of the subscription [*June 30, 1868*] it was agreed that it should be held by McComb until Bardwell could redeem it. (136)

Bardwell "voluntarily offered it, *it being in my name.*" (140)

The agreement that McComb was to hold this stock as security was made *in the spring of 1869.* (137)

McComb was to hold it as security for the $37,580 note [made February 26, 1869, and paid four months later] "and any other I had." (136)

It was specified that McComb was to hold it as security for all future advances; for anything which Bardwell then owed *or might afterwards owe.* (137)

McComb's letter, August 31, 1874, to Leland, Allen & Bates, says "this stock was held by me as security for advances made to a third party *before I heard of Mr. Snyder* in connection therewith, and it is therefore dependent upon the satisfaction of a *prior lien* thereon." But he cannot state the amount of such prior advances. (164)

"It was held by me, subject to an arrangement made with Bardwell for the payment of debts due to me then, *and which might arise;* the understanding was that he wanted to give a contingent interest to Snyder, me to hold the stock as I then held it, in my own name as trustee." (158)

"I don't know what was the particular arrangement between him [Snyder] and Bardwell." (158)

No reason whatever is given for Bardwell offering any such collateral to McComb. At the time of the subscription nothing was paid, and Bardwell was not, so far as appears, then in debt to McComb. Yet McComb says at *that* time it was agreed that he was

to hold it until Bardwell could redeem it. McComb paid nothing upon the subscription. (125) He endorsed the note for $37,580, but that was paid at maturity and was paid out of Snyder's money. McComb says Bardwell voluntarily offered this security, although McComb was not in the practice of requiring collateral in his transactions with Bardwell (139) and Bardwell stood high in credit in the spring of 1869. (121)

As early as September, 1869, McComb knew that Bardwell had Snyder's money, and wanted to turn over this subscription to Snyder.

"I was informed in Bardwell's letter to me, and by Bardwell in conversation, in which he said he had got money from him, for which he made this transfer. (126)

"My letter of Nov. 22 refers to a conversation we had some two months before, when the fact of the money being paid by Snyder to Bardwell was made known, in Snyder's presence." (156)

"I understood in September from Mr. Bardwell, and have so testified, that he had gotten from Mr. Snyder $40,000; that is all I understood; and he wanted to settle with him by giving him a contingent interest in his stock; now the letter of the 12th of November is the *first that I had heard that he had paid him the cost and interest.*" (157)

Now there is one other statement of McComb as to this arrangement, and it is the only one which explains his failure to make known to Snyder, or to express in the trust receipt, his own lien, if he really had any such lien, upon this trust stock or trust subscription. It is as follows, the inquiry having been directed to the "arrangement" referred to in the trust receipt:

"Mr. Bardwell remarked to me that he had gotten money from Snyder and he wanted me to give him an interest in this Southern Railroad Association stock, and wanted from me a paper to that effect, *he pledging himself that he would make good to me whatever difference it made in his transaction with me.*" (121)

Thus it appears by Mr. McComb's own admission that his alleged claim upon the stock or subscription was transformed into Bardwell's personal pledge to make good any difference; an arrangement which we may be sure would never have been made at a time when Bardwell's letters had painfully made known to McComb his embarassed circumstances, and that embarassment was emphasized

by the fact that he had been obliged either to use Snyder's money to that extent, or to sell to Snyder at cost and interest, the whole of this trust subscription, if the making of it involved any substantial difference or chance of loss to McComb.

Be that as it may, *McComb did not make known to Snyder any claim which he asserted against the stock.* If he had had a claim which could have survived under the circumstances, it would have been a gross fraud on Snyder not to have disclosed it at that time. For Snyder had paid cost and interest for the subscription in an undeveloped enterprise, presumably worth no more than cost and interest at the time,—and certainly not worth cost and interest when subject to all the debts which Bardwell, in failing circumstances, might owe to his intimate friend and fellow-operator, McComb.

That McComb did not disclose any such claim to Snyder at that time, is clear from all the evidence which we have before recurred to independently of McComb's Massachusetts testimony; from all the correspondence which does not once so much as hint at anything of the sort, until McComb's letter to Leland, Allen & Bates, of July 21, 1874; and it is equally clear from McComb's testimony, on cross-examination, in the Massachusetts suit, as follows: (164)

"Q. Had you ever before this letter of July 21, 1874, [written nearly five years after the delivery of the trust receipt, and written only three weeks after the Southern Association had became merged in the new consolidated company, and the Southern Association stock had thereby for the first time became valueless, or of merely 'nominal' value,] called Mr. Snyder's attention to the circumstance that you claimed a lien for advances on that stock?

"A. The paper showed it; [this is false, for the paper shows nothing of the kind;] he had possession of the paper, he knew all that I knew about it. [This last assertion is utterly unfounded, as appears by McComb's further answers, which follow.]

"Q. Do you think that is an answer to my question?

"A. I do, sir; *a very honest answer.*

"Q. Had you, except by virtue of this paper, if it bears that construction, called Mr. Snyder's attention to the fact that you had made advances which were a lien upon that stock.

"A. *No, sir.*

"Q. *Had ever anything been said relating to those advances in Mr. Snyder's hearing, that you know of?*

"A. *I do not know anything about that.*

"Q. *That you know of? You do not know of any?*

"A. *No, sir.*"

The "arrangement" referred to in the trust receipt, "an arrangement made some two months *between Josiah Bardwell, C. B. Snyder and myself,*" was, according to McComb's own description and interpretation of the meaning of the expression, and in his own language, already quoted: "*Merely a remark that Mr. Snyder made in my presence one day, that he wanted Bardwell to fix that Southern Railroad Association.*" And it was in view of that "arrangement" and upon Bardwell's statement that Snyder had two months before paid Bardwell the cost and interest, that McComb gave to Snyder his declaration that he held the subscription, under this "arrangement," in trust for Snyder.

POINT SECOND. McComb never accounted to Snyder, and therefore the defendant was liable to account in the present suit.

The answer substantially admits that there has never been any accounting, and the evidence shows that there has been none. Indeed, it is maintained for the defendant that no liability for such accounting exists.

If McComb was trustee for Snyder, as it has been fully shown that he was, then the duty to account follows as a matter of course.

On his New York examination McComb was asked, (188) "For whom do you hold, as trustee, that stock which you mentioned awhile ago?" And he answered, "I don't know. That is just the disputed question. *As soon as ever I find out who is the proper owner, I propose to deliver it to him.*" This, it will be seen was no denial of the trust, but only a statement of McComb that he would not undertake to decide who was his *cestui que trust*, but stood ready to recognize any person who might be determined to be the one standing in that relation to him. It is equivalent to a statement of his readiness to account to the rightful *cestui que trust.*

And so, in the Massachusetts action, McComb, through his counsel, took this position: "A trustee is accountaable to *cestui que trust* in equity alone." "Whenever stock is taken in name of person as trustee, whether actual trust exists or not, Court will regard it a trust and enforce it as such." "It becomes wholly unnecessary, as it is entirely impracticable, to enquire, consider or determine what

anybody's rights may be under the trust created or declared on in this transaction." "When, if ever, a bill in equity shall be brought, and all parties in interest brought into Court, that may be an interesting as it will be a *necessary* question. Till then it is enough that the trust created and acted upon for more than six years by all parties, clearly negatives any other agreement concerning this original subscription, and necessitates a judgment for the defendant in this suit." (292)

The opportunity which McComb thus held himself out as desiring, has been here presented. The proofs leave no doubt as to the identity of the real party in interest, and leave, indeed, no doubt that McComb knew perfectly well, all the while, that Snyder was the beneficiary to whom he was under obligations to render an account of his trust.

The trust was a trust for the benefit of Snyder. McComb never did account. And Snyder's representatives are now entitled to an accounting and to a recovery of such sum as McComb was justly chargeable with on such accounting.

POINT THIRD. Upon an accounting, the defendant is chargeable with the value of the trust stock at the time of its transfer to the Pennsylvania Company, with interest from that date.

This transfer was a conversion.

The conversion was necessarily a fraudulent breach of trust.

The conversion was fraudulently concealed.

The *cestui qui trust*, on discovering the conversion, may, at his option, charge the trustee with the value of the property at the date of the convesion, with interest from that date.

I. The conversion.

On November 7, 1871, McComb received from the Pennsylvania Company ten drafts for the aggregate amount of $1,325,000; and at the same time transferred to that company, absolutely, 5,000 shares in the Southern Railroad Association and 14,000 shares in the New Orleans, Jackson and Great Northern Railroad. This was an absolute sale of the association stock at $125 per share, making, for

5,000 shares, $625,000; and of the New Orleans, Jackson and Great Northern stock at $50 per shares, making, for 14,000 shares, $700,000; the total being, as stated above, $1,325,000.

Simultaneously, McComb transferred to the Pennsylvania Company 5,000 *other* shares in the Southern Railroad Association, *including the 800 shares held by him in trust for Snyder*, as well as 14,000 *other* shares in the New Orleans, Jackson and Great Northern.

The terms of these transactions are stated in the three written agreements of November 8, 1871 (48–51).

The certificates for the 800 shares of stock in the Southern Railroad Association which had stood in the name of H. S. McComb, Trustee,—being numbers 157 to 164, inclusive,—bear the endorsement of H. S. McComb, Trustee, assigning them to the Pennsylvania Company absolutely and irrevocably. (29–31) These certificates remained in the possession of the Pennsylvania Company from 1871 until after the death of McComb and the beginning of the present suit, as part of this block of 5,000 shares. (32, 35) Barnes, the secretary and treasurer of the Pennsylvania Company received the certificates for the whole 10,000 shares at the same time. (37) Green, one of the vice-presidents of the Pennsylvania Railroad Company received the same certificates in 1883 from the Pennsylvania Company and turned them over to McComb's executrix. (38–39) Green had personal knowledge of the transaction and of the fact of the sale of the 5000 shares at $125 per share. (38–47)

The three agreements of November 8, 1871, show the details of the sale and transfer by McComb to the Pennsylvania Company. (48–51) It is unimportant to notice the provisions in regard to the stock of the New Orleans, Jackson and Great Northern Company any further than to note the fact that they are in all respects similar to those in regard to the Southern Railroad Association.

The first agreement recites that *McComb has sold* outright to the Pennsylvania Company 5,000 shares of the Southern Railroad Association stock, and covenants that at the end of two years from date McComb will, on sixty days' written notice, repurchase the same "*at the price paid for the same by the Pennsylvania Company, to wit, * * * one hundred and twenty-five dollars per share*" with thirty per cent. advance thereon,—from which advance is to be deducted any dividends received by the Pennsylvania Company in the meantime.

This second agreement recites the *transfer by McComb* of 5,000 *further* shares of the stock of the Southern Railroad Association, and acknowledges that the same, in connection with the *like number of shares sold outright*, are held by the Pennsylvania Company for the purpose of enabling it to control the Southern Railroad Association, and the Pennsylvania Company agrees to divide the profits equally, "*one-half to go to the said Henry S. McComb* aforesaid, or to the assigns of his interests in said capital stock or any part of the same."

The third agreement recites both transfers; the one "upon certain trusts" and the other upon "absolute purchase," the whole being "a clear majority of the stock;" and provides that if either McComb or the Pennsylvania Company shall *at any time* desire to sell the whole or any part of their interest, the other party shall have the first right to buy at $125 per share, with interest at ten per cent. per annum from date; and further that, if in such case, the other party shall elect not to buy at that price, then *only* the party desiring to sell shall be at liberty to dispose of its interest, "*subject, however*, to the conditions and trusts upon which the same are held by the Pennsylvania Company." McComb further covenants that the authorized stock of the Southern Railroad Association is $2,000,000, "*all of which has been issued*," and that it shall not be increased without the consent of both parties.

Thus McComb, on November 7, 1871, sold outright 5,000 shares belonging to himself, at $125 per share.

And thus McComb, at the same time, transferred these 800 shares of trust stock, by endorsement signed by him "H. S. McComb, Trustee."

By this transaction McComb, obtaining for himself $125 per share, or $625,000, his own holdings, and keeping it,—for *he was never called upon to repurchase*—parted with this trust stock irrevocably. He retained, as to the trust stock, only the right to receive its future dividends; but he gave to the new holder the right to buy it at any time at its then value of $125 per share, and ten per cent. interest. And if the Pennsylvania Company should not choose so to buy it, it was still to remain subject to that company's control, and no sale by McComb after that company's refusal to buy it could *ever* free it from that company's control.

Corporate stock has two distinct elements of value. It represents the equitable interest of the stockholder in the common

property, of which the directors are trustees, and the value of that interest depends upon the fidelity with which the directors discharge their trust. It represents also the second and indispensible element, the right of a voice in the selection of the directors and in all other questions of corporate interest which are by law required to be submitted to the stockholders, as, for instance, a mortgage of its property, and the right to call the directors to account, or to enforce the rights of the corporation when the directors prove faithless to their trust. And these two elements of value, in the holding of corporate stock, cannot be dissevered without imperilling the whole. That is, the second cannot be destroyed without depriving the stockholder of his protection in the first.

Therefore, in the most favorable view of McComb's act, it was a complete conversion of an essential, an indispensible element, in the value of the trust property.

But it was more than this. It was, in fact, a complete transfer in law of the whole property. After it was made there was nothing to prevent the Pennsylvania Company from transferring this trust property, these 800 trust shares, to any other person; there was nothing to prevent any transferee of the Pennsylvania Company, without notice of these secret agreements, from holding this trust stock in utter disregard of any claims of Snyder or of McComb, Trustee.

It is no answer to this to say that in case of such a transfer the Pennsylvania Company would be liable in damages, under these agreements. That company might prove to be insolvent and unable to respond in damages.

Neither could McComb, Trustee, require his *cestui que trust*, under any known principle, without the assent of the *cestui que trust*, and by a secret transaction, to look to a new trustee for the protection of his rights. A trust is a personal confidence; and before it is transferred from the known trustee to a stranger the *cestui que trust* is entitled to notice, and to be heard.

But, even aside from these considerations, the terms of this transfer condemn it as an absolutely undeniable breach of trust. The only provision, in the whole transaction, under which it was possible that McComb should *ever* realize the value of the trust property, was the provision relating to a possible sale, and under that the Pennsylvania Company was vested with the absolute and unqualified right to elect to buy the trust property outright at $125 per share and ten per cent interest; and this, even though the value of the

trust stock should rise to $500 or $1,000 per share, or any higher price. In view of this element of the transaction it seems idle to claim, in McComb's behalf, that he retained, through these agreements, the control over the property in the interest of his *cestui que trust.*

The certificates of this trust stock, thus endorsed over to the Pennsylvania Company, have ever since remained in that condition, and although after this suit was brought the certificates were handed over by that company they still bore and now bear in that endorsement the evidence of that company's title.

Thus McComb's transfer was, in fact, effectual to vest in the Pennsylvania Company the absolute control over this property so long as it had any value; and as the merger of the Southern Railroad Association into the new consolidated company in July, 1874, which left the association stock valueless, must have been done with the assent, if not by the active procurement of the Pennsylvania Company as the holder of the controlling interest in the stock, McComb's breach of trust contributed directly to the destruction of the value of the trust property, and the fact that McComb became president of the new consolidated company would indicate that he took an active part in bringing about the consolidation.

And yet, on the very eve of this wiping out of the stock, McComb told Snyder at the Windsor Hotel interview that Snyder had better keep the stock, that it was a good thing, worth two for one. A year later McComb testified in New York as follows:

"Q. What has become of the original subscription mentioned in this letter?

"A. *It is still in my possession or under my control.*

"Q. *In what shape is it now?*

"A. *Stock of the company, as it was then.*

"Q. *In whose name does it stand?*

"A. *H. S. McComb, Trustee.*

"Q. *Has it so stood ever since this paper was written?*

"A. *Yes, sir; ever since.*

"Q. *Continuously?*

"A. *Yes, sir.*" (185)

II. The measure of recovery.

The 800 shares of stock issued on October 6, 1870, to H. S. McComb, Trustee, represented the original subscription of H. S. McComb, Trustee, for $60,000, enlarged, by increase of capital at the time when the original voluntary association was merged into the Southern Railroad Association, incorporated, to $80,000. This fact has been established beyond a peradventure and was fully admitted by McComb.

The trust receipt admits that seventy per cent. on sixty thousand dollars,—that is $42,000,—had been paid at its date, November, 1869. And a subsequent assessment of March, 1870, of five per cent. on $80,000, amounting to $4,000, we have shown was also paid out of Snyder's money in the hands of Bardwell's firm, F. Skinner & Co., in August, 1870.

The stock was issued in October, 1870, as full stock, and has been treated as such. It is not pretended that McComb paid anything on it, and McComb himself says he did not. It is to be presumed from the issue of the stock that all calls upon it were paid, equally with those on the remaining stock. And this presumption seems to be transformed into a certainty by comparing these known payments with the amount paid in upon the subscription of Jordan for his firm of Jordan, Marsh and Company.

Marsh says (90) "I think, without knowing *exactly*, that we got 2330 shares for $133,000."

This subscription was originally for $175,000, which by the the increase of the capital was increased in the same ratio, and became one-third more,—that is, $233,333, or in round numbers $233,000 representing 2330 shares.

Seventy per cent. on the original amount paid up to the time of the trust receipt, November 1869, would be $122,500. The assessment of March, 1870, of five per cent. on the increased amount of $233,000, would be $11,650. Add these two sums and we get $134,150, which is in substantial conformity with Marsh's statement: "I think without knowing exactly, that we got 2,330 shares for $133,000."

Thus the $46,000 shown to have been paid on the trust subscription represents the same ratio to the whole that $134,150 paid on the Jordan subscription bore to the whole of that. The stock was issued for both subscriptions, for the increased amount.

Snyder was thus in every way entitled to the full and entire benefit

of the trust stock. Bardwell requested that he should be recognized as succeeding to all Bardwell's rights; McComb declared the trust for Snyder, unqualifiedly; and Snyder actually paid for the whole in the same proportion in which the other subscribers paid.

The remedies of *cestui que trust* for breach of trust on the part of the trustee are well settled and established.

In Perry on Trusts (§ 843) it is said: "If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally." And again, (§ 847) "In awarding compensation to the *cestui que trust* for a breach of trust by the trustee, the court does not regard it as material that the trustee has made no profit or advantage out of the estate. If there is a breach of the trust and an inevitable calamity destroys the property, the trustee must account for it."

It is said in *Oliver vs. Piatt*, 3 Howard, 401: "If the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee liable for the breach of the trust. This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property, although, in the latter case, the *cestui que trust* may, if he pleases, avail himself of his own right and take back and hold the trust property upon the original trust; *but he is not compelled to do so.* The reason is that this would enable a trustee to avail himself of his own wrong; and, if he had made a profitable investment of a trust fund, to appropriate the profit to his own benefit, and by a repurchase of the trust fund to charge the loss or deterioration in value, if any such there had been in the meantime, to the account of the *cestui que trust*,—whereas *the rule in equity is that all the gain made by the trustee by a wrongful appropriation of a trust fund shall go to the cestui que trust*, and all the losses shall be borne by the trustee himself."

Sloo vs. Law, 3 Blatchford, 477; "It is one of the settled principles of courts of equity that the trustee shall not take advantage of his situation to obtain any personal benefit to himself at the expense of his *cestui que trust.* Upon this principle it is that the trustee is not permitted to purchase the trust estate, or to make any contract with himself individually, or one in which he is personally interested

and from which he may derive a benefit to the prejudice of his *cestui que trust.*"

Taylor vs. Benham, 5 Howard, 275; "A trustee is liable for misconduct, a breach of trust or negligence, as well as for money actually received, and if in these ways he injures the *cestui que trust* he is liable, whether he himself gains by his misbehavior or not."

The fidelity of the trustee is the sole protection of the *cestui que trust.* The trustee alone can act in behalf of the trust estate. He is usually selected with the idea that he will be a more capable manager than the beneficiary. It is his duty to be not simply honest, but vigilant as well. The very lowest measure of his responsibity is that which requires him to do at least as well by the trust property as he does by his own. But if he is lax and negligent with his own, he is not permitted to be lax and negligent with his trust, for what he does not do for the trust, remains undone, and the opportunity which he neglects is lost. The very word trust imports the peculiar degree of confidence which is necessarily reposed in the trustee, and the peculiar obligation and responsibility which that confidence imposes upon his conscience and his honor, which it is the especial care of equity to enforce.

These considerations should be borne in mind, in judging the acts of McComb with reference to his trust for Snyder, and the responsibility which those acts leave upon him.

It is difficult to imagine how McComb could have violated the letter or the spirit of his duty as trustee more completely than he did. He turned the trust to his own profit so far as it was possible to do so. He sold his own stock for $125 per share; but instead of protecting the trust stock, he put it out of his power to protect it, by parting with his control over it. He inaugurated and participated in the course of events which resulted in depriving the stock of all value. He concealed the facts from the *cestui que trust* and kept him quiet by false statements. In 1873 in answer to the inquiry, "How does the 60 M of Mr. Snyder's stand affected," he had said: "The South'n R. R. Association stands all right, and *everybody's interest stands upright and square.*" And when, three years after the conversion, Snyder gave signs of insisting upon his rights and realizing upon his interest, McComb interposed the pretext, never hinted at before, that he himself had a lien upon the trust property, although he knew that such a lien would then be worth-

less, even if it had existed, because the stock itself had become worthless.

Now, while the present suit is not based upon the conversion, but on the right to call the trustee to account, and on the accounting to charge him upon his personal liability by reason of the conversion, the measure of the relief should be the value of the stock at the time of the conversion, if it can be ascertained, with interest from that time, just as it would be in an action upon the conversion itself.

This rule was recognized by the court below, but was not applied for the reason that the court thought that the proofs did not clearly indicate what that value was, and felt constrained to confine itself to a restoration of the amount which Snyder had paid, with interest. This was fixed at the seventy per cent. upon sixty thousand dollars, recited in the trust receipt on November 23, 1869, and the decree was for $42,000 with interest from that date. But in doing this the learned Judges overlooked the fact that Snyder paid $4,000 additional in 1870, as of March 1, so that the total payments should amount to $46,000.

Upon the trial in the court below there was no particular controversy upon the question of value. The defense rested on the theory that McComb was under no liability whatever, and it was assumed on the part of the complainants that the sale to the Pennsylvania Company sufficiently fixed the value of the stock at $125 per share. Accordingly there were several considerations arising on the proofs and bearing upon the question of value which were not brought to the attention of the Court as fully and completely as would have been done if it had then been felt that the question of value was matter of controversy.

The learned judges in the court below thought the price paid by the Pennsylvania Company was not satisfactory evidence of the value of the stock because the sale was coupled with an undertaking on the part of McComb to take the stock back at an advanced price at the end of two years if the Pennsylvania Company should so desire, and that the offers made by McComb from time to time were but "slight evidence" of the value, and were rather made to satisfy the holders of the stock that it was to their interest to keep it. (304)

Nevertheless, it is admitted that these offers, and the sale to the Pennsylvania Company are *some* evidence of value, and while McComb's conduct throughout was such as to make it natural that

we should distrust everything he said and did, there is further evidence in the case which makes it entirely reasonable to believe that the price paid by the Pennsylvania Company represented the actual value of the stock *at that time*.

It is natural that our judgment as to the views entertained at the time and as to the merits of the enterprise should be largely affected by the fact of the final failure. But we should remember that it is easier to be wise after the event, than before it, and that ultimate failure does not preclude the idea of prosperity for a while, and of expectations, confidently and honestly entertained, of great success.

There is no reason to doubt that the Southern Railroad Association was formed in the expectation that it would be a profitable enterprise. Responsible parties subscribed one and a half million of dollars, McComb himself subscribing $415,000 in his own behalf. It was an era of speculation in railroad properties, to which the restored peace of the country and its rapid growth and development had given a great impetus. McComb and his associates went into it to make money and to make it on a large scale.

The Association obtained a charter and incorporated under it in January, 1869. It acquired by lease the control of the property of the Mississippi Central Railroad, running from Canton northerly to Jackson, Tennessee. From Canton the line of the New Orleans, Jackson and Great Northern Railroad ran southerly to New Orleans.

There is nothing to indicate that the enterprise had met with any misfortunes or reverses up to November, 1871. McComb, it is true says that there were crevasses which destroyed the property and cost two millions of dollars. But he does not fix the date of these, any further than to say that they were previous to the foreclosure and sale of the property, (131) which, as we have seen, took place in December, 1876, and his testimony seems intended to convey the idea that these crevasses and the loss they entailed occasioned the foreclosure and sale. But it is evident that he was speaking of the New Orleans, Jackson and Great Northern Railroad or of its contribution to the company formed by the consolidation in July, 1874, because Bonnet Carre which he mentions is on that line and within a few miles of New Orleans. Calhoun says that the crevasses occurred where the river ran, that is, overflowed, into Lake Pondhatrain, and therefore, within the State of Louisiana, and that the Mississippi Central, which was the line of the Association and had its southerly terminus at Canton, Mississippi, did not run near enough to the Mississippi River to be affected by its overflows. (199)

Therefore, we repeat, there is no resaon to suppose that the enterprise was not progressing favorably and prosperously in November, 1871. And at that time the Pennsylvania Company controlled a line of railroad called the Memphis and Charleston intersecting the line of the Association at Grand Junction, Tennessee, and was "looking toward that direction of country for business." (200)

Under these circumstances it was not strange that the Pennsylvania Company deemed it to be to its interest to acquire control of the Southern Railroad Association. It in no way appears that the transaction was one of McComb's seeking, and the testimony of Calhoun (200) to which we have just referred would rather indicate that it was sought by the Pennsylvania Company. At all events, the fact that the Pennsylvania Company was willing to pay $125 per share for 5000 shares, even coupled with the privilege of returning it within two years at a higher price, is evidence that the property was then believed to have a very substantial value.

Furthermore it is quite reasonable to suppose that the provision of the contracts in regard to the shares transferred but not sold to the Pennsylvania Company represented an exchange of what were then understood to be equivalent benefits between the contracting parties. The Pennsylvania Company obtained the desired control of the two connecting lines, that of the Southern Railroad Association and that of the New Orleans, Jackson and Great Northern. The equitable interest remaining in McComb or those he represented secured his services and his co-operation in the continuance of the enterprise. The profit resulting was to be divided equally, subject always to the control thus established. And the Pennsylvania Company was entitled to have the opportunity to buy this equitable interest at $125 per share and ten per cent. interest, before McComb should be at liberty to sell it to any other party. In all this there is nothing inconsistent with the idea that both parties considered the stock fairly worth $125 per share.

After this transaction the enterprise seems to have gone on in its course of development, with McComb's co-operation. It was only six months later that the Southern Railroad Association made its mortgage for $8,000,000, of which $3,371,000 was to be devoted to the extension of its line from Jackson, Tennessee, to the Ohio River, and the maintenance and operation of the railroad. This mortgage was made, May 1, 1872, to Forstall, Newell and Alexander, trustees, and was executed by McComb as president of the Southern Railroad Association. (233-240) And on the same day the New Orleans,

Jackson and Great Northern likewise made a mortgage to the same trustees for $8,000,000, of which $3,500,000, was to be devoted to the improvement and operation of its railroad, and this mortgage was executed by McComb, as president of the New Orleans, Jackson and Great Northern. (242–255) These mortgages indicate that the two allied enterprises had at that time abundant vitality, and were being prosecuted with vigor.

It was late in this same year, 1872, or early in 1873, that McComb told Marsh and Snyder at the office of the Southern Railroad Association in New York that he was prepared to offer them par and interest for their stock. Par and interest would be in the neighborhood of $125 per share. There is no reason to believe that at this time the enterprise was not in a flourishing and very promising condition. And when McComb advised Marsh and Snyder in this interview that their stock was a good thing to keep he might well have believed that the advice was sound.

So, again, in the spring of 1873, McComb made a direct and positive offer to Henry Mulliken, of $25,000 for 174 shares of the stock. (93) This offer was at the rate of $143 per share, and it was not accompanied by any statement that it was a good thing for Mulliken to keep, or that it was worth more. Doubtless, if Mulliken had accepted the offer at the time, McComb would have taken the stock. Surely, such an unqualified offer, with every appearance of sincerity, by a man who knew as much about the value of the stock as any one could, ought to be regarded as made in good faith in the absence of any evidence to the contrary, and ought to be good proof of value as against the very man who made the offer. It is true that afterwards Mulliken wrote McComb that he would accept the offer, but it was two or three months later when McComb told Mulliken that he had only " recently " received Mulliken's letter and that his offer was not an open one, and that he, McComb, had no money then. But after that, and in the autumn of 1873, in another interview, McComb offered and Mulliken declined $17,000 for the same stock; and $17,000 for 174 shares is a fraction less than $100 per share.

All this is entirely consistent with the idea that the affairs of the Southern Railroad Association were prospering, and were expected to give a substantial profit to those who were interested in it. And we must bear in mind that there is not a single word of evidence to indicate that the enterprise had met with any reverses or losses up to this time, or that it was in any way failing to meet the expectations of those who were interested in it.

We have seen already that by the terms of the original sale to the Pennsylvania Company McComb covenanted that at the end of two years from date, on notice from the Pennsylvania Company, repurchase from that company the 5000 shares of Southern Railroad Association stock at the price of $125 per share and thirty per cent. advance thereon. (48) Now, whether it was or was not the fact that this covenant was made to induce the purchase by the Pennsylvania Company in November, 1871, one thing is very certain, and that is that in November, 1873, the Pennsylvania Company preferred to retain the stock rather than to sell it back to McComb at $125 per share and thirty per cent. advance, or $162.50 per share. An article is said to be worth what it will bring. McComb was perfectly solvent; he was a man of large means; his agreement for repurchase was valid and binding. What more convincing evidence that the stock was worth $162.50 per share in November, 1873, could be found than is afforded by the fact that the Pennsylvania Company might then have sold it at that price, but preferred not to do so? This circumstance seems to effectually negative the idea that $125 per share was a "fictitious" or "fancy" price in November, 1871.

And these considerations acquire redoubled force and significance when we remember that at this very time when the Pensylvania Company declined to avail itself of its option to sell the stock at $162 50 per share, the financial panic of 1873 had fallen upon the country, and the temptation to sell at a good price any property of doubtful intrinsic value must have been very great. But although the effects of that panic may have, at a later time, made themselves felt, and contributed to the ultimate collapse of the enterprise, it is evident that they had not then shown themselves in any way to shake the faith of those in interest, or to impair the value of the stock.

William Calhoun was connected with the Southern Railroad Association from the middle of August, 1870, so long as it continued to exist. He first investigated the accounts, and "straightened them out," and subsequently became secretary and treasurer. He was, therefore, in condition to understand the financial affairs of the association very fully. (197)

Now, in 1874, Calhoun bought and paid for ten shares of the Southern Railroad Association stock. (203) For this he paid par. (210) He also paid a forty per cent. assessment "levied upon the stockholders to pay the second mortgage scrip certificates and for

other purposes" (211) and got a bond as an inducement. This assessment was levied in June, 1874, but was not generally paid.

So here we have an actual sale at par, in or prior to June, 1874, on the very eve of the consolidation, which had the effect of leaving only a "nominal value" in the stock. Subsequently, Calhoun transferred his stock, (201) and got $7.50 a share for it. (207) But McComb "generously" paid Calhoun's salary for years after the business came to an end. (205)

All this goes to show that it was not any failure of the enterprise that destroyed the value of the stock in July, 1874, but its merger in the new corporation, the New Orleans, St. Louis and Chicago Railroad Company, through the consolidation which then took place. The parties in control, the Pennsylvania Company and McComb, were by virtue of that very fact the parties who devised and carried through that consolidation, and the presumption is an overwhelming one, that they did not commit the act which had the necessary and foreseen effect of rendering their stock in the Southern Railroad Association valueless, without securing to themselves adequate compensation in some other form.

McComb himself testified that the financial condition of the Southern Railroad Association in 1874 was "*very good*," and practically admitted that it was the consolidation which deprived the stock of its value. (131) The enterprise still retained value and promise; the value of the stock became "merely nominal" because it no longer represented the property; but the consolidated company continued, under McComb's presidency, in active operation until the foreclosure in 1876. Whether the ultimate failure was due to the continuance of the general depression of the business of the country which had its origin in the panic of 1873, or whether it came because those who had controlled the two roads since November, 1871, had absorbed to themselves all the substantial value of the properties, by processes such as have been known to wreck other railroad enterprises, the proofs do not disclose. The issue of about three and a half million dollars of bonds on each of the two roads for their improvement, under the mortgages of May 1, 1872, afforded opportunities for contracts which might be made very profitable to the contractors. But, whatever the cause of the ultimate failure in 1876, there is not one particle of evidence that the enterprise was not in a highly prosperous condition in 1871 and for a long time afterward.

Upon all this evidence we may justly claim that the sale to the Pennsylvania Company in November, 1871, fixed the value of the stock at $125 per share. It was not a fictitious, but an actual value, because that price was actually paid and *permanently* retained, notwithstanding the right of the buyer to take it back with thirty per cent. additional, two years later. And surely, in a suit against McComb or his personal representatives we are entitled to rely upon his declarations to Snyder as to the value of the stock, as true ; especially when the same declarations were proved by the same witnesses in the Massachusetts action, and were not then even attempted to be denied or explained away by McComb.

POINT FIFTH. The judgment in the Massachusetts action does not have the effect of res adjudicata in the present suit.

It is true that the Massachusetts action was one brought by Snyder against McComb.

But it was an action at law.

It was based upon an express contract of McComb to repay to Snyder the amount of his investment and interest, at any time. But it did not involve the question of the existence of the trust and of McComb's liability to account. It asked pecuniary damages and nothing more.

It is immaterial that it alleged a conversion, because—*first*, that count was abandoned, and, *second*, the allegation was of a conversion *at law*, and required a *legal title* in Snyder to sustain it, while in fact the legal title was admittedly in McComb, and Snyder was merely a *cestui que trust*.

It is clear, then, that unless the express contract, which was asserted by Snyder in the Massachusetts action, was established, Snyder could not recover in that action, and could only obtain relief through the interposition of equity, which must first declare McComb to be trustee for Snyder, and then require McComb to account as such trustee.

The motion, made and denied in the Massachusetts action, to amend the declaration into a bill in equity, confirms our position. It was based on the idea that Snyder could have no relief by his

action at law; and its denial was no determination of the merits of his claim to equitable relief, because it was a distinct refusal of the court to consider those merits.

The motion was made under the Massachusetts statute, which the defendant has put in evidence. (107) "The Superior Court and the Supreme Judicial Court may *in their discretion*, and upon such terms as they may deem just, allow amendments changing a suit at law into a proceeding in equity, or a proceeding in equity into a suit at law, *if the same be necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought.*"

Under this statute the court in Massachusetts had no alternative but to deny the motion. The cause for which the action was intended to be brought was the recovery of damages under an express contract of McComb to return Snyder's money and interest, and had no relation to the establishment of a trust, and an accounting thereunder. And even if this were not so, the granting of such a motion would be purely discretionary and its denial would mean no more than that the Court, in the exercise of its discretion, thought best to leave Snyder to prosecute an independent suit in equity for the equitable relief to which he was entitled.

The following cases clearly and fully state the law applicable here:

Cromwell vs. County of Sac, 94 United States, 351: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action. * * * On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action. Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a

different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Kent vs. Chase, 15 New Hampshire, 9; "The issue presented by the pleadings may be modified by the proceedings upon the trial, as where a defense is withdrawn from consideration, or where a count in the declaration is abandoned. However this may be, the matter in issue, or point of controversy, is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated."

Now, the proofs clearly show what was and what was not tried in the Massachusetts action.

The question of conversion was not tried in any way.

The fifth count in the original declaration was "that the defendant has converted to his own use six hundred shares of the capital stock of the Southern Railroad Association, a corporation duly established by the laws of the states of Mississippi and Tennessee, *the property of the plaintiff.*" This was an allegation of conversion at law, and required legal title in the plaintiff to support it. In the amended declaration this count became the third count. (100, 102)

To this count the defendant demurred as insufficient in law, "in that it is alleged therein that the defendant has converted to his own use shares of stock and no certificate of stock is alleged to have been converted." (104)

This demurrer raised an issue of law as to the sufficiency of the pleading. It raised no issue as to the fact of a conversion, and no such issue was ever raised in the Massachusetts action. "When the case came to be tried plaintiff's counsel were of opinion that the demurrer was well taken, and, by mutual consent, the count was abandoned." (287) This was the testimony of counsel for plaintiff in that action, and is corroborated by the brief presented by counsel for defendant in that action upon the final argument therein, which says: "There is added a count in tort for conversion of 600 shares South. R. R. Association. * * * *The count in tort has been abandoned.*" (291)

The only issue tried was that of the express contract alleged in the declaration.

Counsel who tried the action for the plaintiff so testified. (228)

The defendant's brief upon the same trial shows the same fact. It says: (291–292)

"If the agreement alleged was not made, the plaintiff cannot recover, whether other or different agreements, if any, may have been made.

"Other and different agreements not only will not aid or establish this, but may be shown under a general denial to repel it."

"It is important to keep in view precisely what this alleged agreement is on which plaintiff seeks to recover.

"This suit is not a bill in equity to enforce a trust declared orally or in writing.

"It is not an action at law even if such an action would lie on any 'trust receipt.'

"It is an action upon an alleged distinct and specific contract."

"If the Court is not satisfied that the agreement alleged in the declaration was made, there is an end of this case.

"Still more, if the Court is satisfied negatively that such an agreement under the facts appearing never was, or could have been, made."

"It is, of course, unnecessary to give any consideration to the 'trust receipt,' except as it disproves the agreement alleged, because—

"(1) It is not the contract alleged and declared on, and for breach of which money is sought.

"(2) Because its only scope and effect is to create a trust, for the enforcement of which no action at law can be brought, but only a remedy sought in equity."

"So long as no other relation exists between the parties but that of trustee and *cestui que trust* no action can be maintained by the latter against the former for any money in his hands. The trustee is the only person entitled at law to the money, and the remedy of the *cestui que trust* is exclusively in a court of equity. The *cestui que trust* has no legal remedy."

"Wherever stock is taken in name of person as trustee, whether actual trust exists or not, court will regard it a trust and enforce it as such."

"*It becomes wholly unnecessary, as it is entirely impracticable, to inquire, consider, or determine what anybody's rights may be under the trust created or declared on in this transaction.*

"*When, if ever, a bill in equity shall be brought,* and all parties

in interest brought into court, *that may be an interesting as it will be a necessary question.* Till then it is enough that *the trust created and acted upon more than six years by all parties* clearly negatives any other agreement concerning this original subscription, and *necessitates a judgment for the defendant in this suit.*"

This was good law and was recognized as such. And when the Massachusetts Court found that the special contract was not established it did not and could not dispose of the rights of the plaintiff as *cestui que trust*, for those rights were not then drawn in question. On the contrary, the existence of those rights was urged as the very reason why the plaintiff could not recover at law.

This, then, left "*the trust created and acted on for more than six years by all parties*" untouched. Snyder's claim of a sepecial contract having been denied and defeated, he was left as before in his position of *cestui que trust*, thus substantially conceded. And as long as this relation continued it carried with it the right of Snyder to call his trustee to an account. Upon this right the Massachusetts action had no effect, but it remained undisturbed and unaffected, just as it would have done if the Massachusetts action had never been brought.

POINT SIXTH. Statutes of limitation have no application to the case.

The answer sets up—

That the cause of action did not accrue within *two* years;

That the cause of action did not accrue within *six* years;

That the cause of action did not accrue within *ten* years;

No statutes have been pointed out as those referred to and intended to be relied on.

There do not appear to be any statutes of the State of Delaware appropriate to these averments; but if there were, they would have no necessary force in the courts of equity of the United States.

It is said in *Johnston v. Roe*, 1 Federal Reporter, 695: "In the exercise of the chancery jurisdiction conferred by the constitution and laws of the United States this court is not governed by the State practice. The Supreme Court has repeatedly decided that the rules governing the exercise of this jurisdiction are the same in all the States, and according to the practice of courts of equity in the

patent country as contradistinguished from courts of law. * * * The rules of decision in equity cases in the federal courts are to be uniform, and in the exercise of their equitable jurisdiction those courts are unaffected by State legislation."

So in *Payne v. Hook*, 7 Wallace, 430 : "The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses ; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union."

The established doctrine of equity is that no lapse of time bars a trust.

This Court said, in *Prevost vs. Gratz*, 6 Wheaton, 497 : "It is certainly true that length of time is no bar to a trust clearly established ; and, in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be permitted to repel relief. On the contrary, it would seem that the length of time during which fraud has been successfully concealed and practiced is rather an aggregation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief."

To similar effect is the language of Chancellor KENT in *Decouche vs. Savetier*, 3 Johnson's Chancery, 216 : "All the cases admit that no time bars a direct trust, as between trustee and *cestui que trust ;*" and in *Goodrich vs. Pendleton*, 3 Johnson's Chancery, 390 : "I need not stay to show that the defendant, being charged with a fraudulent breach of trust, as an agent or trustee for the executrix, cannot set up the statute of limitations so long as the trust is admitted. *A trustee cannot protect himself by the statute of limitations in a suit brought by the cestui que trust ;* it would be a waste of time to look for authorities in support of a *principle so well known and established.* The only question that can now be met is whether the defendant has sufficiently met and denied the charges in respect to the creation and breaches of this trust."

In the present case the application of the rule is clearly and forcibly expressed in the opinion of Mr. Justice BRADLEY : "The plea of the statute of limitations set up by the defendant does not lie in this case. It is a case of pure trust, subsisting to this hour and not denied. Had the trust been repudiated, the statute might have run from the time of such repudiation, but it never has been repudiated. The relief sought by the *cestui que trust* is not a legal demand, but a purely equitable one, namely, recompense for a deterioration or un-

lawful disposition of the trust estate by the fault of the trustee, and an account of the proceeds or value thereof. The statute of limitations is no defense in such a case. Great lapse of time and unreasonable delay might be, but the present suit is not amenable to that charge. Sufficient reason is shown for any delay that has occurred. The secrecy observed by McComb in his transactions with the Pennsylvania Company and the ignorance in which Snyder and his representatives were kept are a sufficient answer to the charge of laches and unreasonable delay." (304–305)

POINT SEVENTH. The decree should be modified by directing that McComb's executrix pay to Snyder's administrators the sum of one hundred thousand dollars, the value of the trust property on November 8, 1871, with interest from that date, and costs, and as so modified, affirmed.

It is unqestioned that the measure of the recovery is the value of the trust stock. This is distinctly recognized in the language just quoted, that the relief appropriate is "recompense for a deterioration or unlawful disposition of the trust estate by the fault of the trustee and an account of *the proceeds or value thereof.*"

McComb sold his own stock for $125 per share, or $625,000. It was an absolute sale, and he was never required to pay back any part of his price. At the same time he put the trust property out of his hands; and it remained out of his hands so long as he lived.

But he repeatedly told Snyder that the stock was worth far more than par and interest, and Snyder was thereby induced to let his interest remain in McComb's hands. There is surely no hardship in holding McComb to the truth of those statements, and charging him with the same price which he got for his own, even if those statements were not true. And while the representations as to its being worth "three or four for one," or even "two for one" were doubtless exaggerated, yet all the facts concur in making it reasonable to believe that it was really worth "par and interest" and that the sale at $125 per share was a just and fair measure of its value.

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